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NORTH CAROLINA REPORTS

VOL. 178

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1919

ROBERT C. STRONG
REPORTER

PRINTED FOR THE STATE BY
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RALEIGH, N. C.
1920

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1919

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,	WILLIAM A. HOKE,
GEORGE H. BROWN,	WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
O. H. Guion	Fifth	Craven.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Columbus.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
J. Lloyd Horton	Fifth	Pitt.
J. A. Powers	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. L. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
J. E. Shipman	Eighteenth	Henderson.
Geo. M. Pritchard	Nineteenth	Madison.
G. L. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

FALL TERM, 1919

Licenses to practice law were granted to the following named applicants, who passed a successful examination:

Name.	*County.*
Aiken, John Will	Catawba.
Allen, Joel Isham, Jr.	Dillon, S. C.
Austin, William Bryant	Ashe.
Bailey, Carl LeRoy	Washington.
Best, Lee James	Harnett.
Boney, Norwood Bruce	Duplin.
Boren, Norman Addison	Guilford.
Bryant, Victor Silas, Jr.	Durham.
Burrus, Charles Andrew	Cleveland.
Candler, William Washington	Buncombe.
Cohn, Frederick Jacob	Wayne.
Cullom, Edward Farmer	Wake.
Denny, Emery Byrd	Rowan.
Edwards, William McKinley	Buncombe.
Emry, Mrs. Opal I. T.	Halifax.
Ervin, Samuel James, Jr.	Burke.
Finlator, John Haywood	Wake.
Franklin, Andrew Jackson, Jr.	Swain.
Gaston, Harley Black	Gaston.
Greene, George Bascom	Lenoir.
Hanna, Hugh Oliver	Gifford, S. C.
Holland, Ravenel Carlisle	Chowan.
Hudson, Hinton Gardner	Johnston.
Hyatt, Carl Britt	Yancey.
Ivey, Walton Bert	Robeson.
Keller, Walter Willis	Lebanon Church, Va.
Katz, Hyman	Lenoir.
Lee, Joseph Ira	Johnston.
Lewis, Millard Lawson	Nash.
Leiby, Elias	Catawba.
Litaker, Henry Daniel	Lincoln.
Mann, Elmo	Hyde.
Manuel, James William	Rockingham.
Marshburn, Owen Meredith	Wake.

Name.	*County.*
Maxwell, Raymond Craft	Wake.
McIntire, Gaston Calhoun	New Hanover.
McIver, Duncan Evander	Lee.
McMillan, Robert Leroy	Scotland.
Moose, George Kelly	Cabarrus.
Nettles, Zebulon Vance	Buncombe.
Newman, Harris Philip	New Hanover.
Odom, Archie David	Nash.
Oettinger, Albert	Wilson.
Patton, Nollie Moore	Burke.
Palmer, Miss Madeline Elizabeth	Mecklenburg.
Peele, Elbert Sidney	Martin.
Pless, James William, Jr.	McDowell.
Privott, Wood	Chowan.
Pruden, William Dorsey	Chowan.
Royster, Beverly Sampson, Jr.	Granville.
Sams, Edward Emmet	Wake.
Scott, Lorenzo	Pender.
Smith, Bryant	Guilford.
Spurling, Lee Spurgeon	Cleveland.
Stratford, Miss Willie May	Mecklenburg.
Suddertii, George Murry	Watauga.
Walser, Don Adderton	Davidson.
White, William Preston, Jr.	Halifax.
Young, Don Columbus	Buncombe.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1920

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1920
First District	February 3
Second District	February 10
Third and Fourth Districts	February 17
Fifth District	February 24
Sixth District	March 2
Seventh District	March 9
Eighth and Ninth Districts	March 16
Tenth District	March 23
Eleventh District	March 30
Twelfth District	April 6
Thirteenth District	April 13
Fourteenth District	April 20
Fifteenth and Sixteenth Districts	April 27
Seventeenth and Eighteenth Districts	May 4
Nineteenth District	May 11
Twentieth District	May 18

SUPERIOR COURTS, SPRING TERM, 1920

The parenthesis numerals following the date of a term indicates the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1920—*Judge Stacy.*

Pasquotank—Dec. 29† (2); Feb. 9† (1); Mar. 15 (1).

Camden—Mar. 8 (1).

Perquimans—Jan. 19 (1); April 12 (1).

Currituck—Jan. 26† (1); Mar. 1 (1).

Beaufort—Jan. 12 (1); Feb. 16† (2); May 3 (1).

Gates—Mar. 22 (1).

Chowan—Mar. 29 (1).

Tyrrell—April 19 (2).

Hyde—May 17 (1).

Dare—May 24 (1).

SECOND JUDICIAL DISTRICT

Spring Term, 1920—*Judge Lyon.*

Wilson—Jan. 12 (1); Feb. 2 (2); May 10 (2); June 21† (1).

Nash— Jan. 19 (1); Feb. 23† (1); Mar. 8 (1); April 26 (2); May 24† (1).

Edgecombe—Mar. 1 (1); Mar. 29.

Martin—Mar. 15 (2); June 14 (1).

Washington—Dec., 1919 (1); April 12† (1), †(2); May 31 (2).

THIRD JUDICIAL DISTRICT

Spring Term, 1920—*Judge Devin.*

Warren—Jan. 12 (2); May 17 (2).

Halifax—Jan. 26 (2); Mar. 15 (2); May 31 (2).

Bertie—Feb. 9 (1); May 3 (2).

Hertford—Feb. 23 (1); April 12 (2).

Vance—Mar. 1 (2); June 14 (2).

Northampton—Mar. 29 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1920—*Judge Bond.*

Harnett—Jan. 5 (1); Feb. 2† (2); May 17 (1).

Chatham—Jan. 12 (1); Mar. 15† (1); May 10† (1).

Wayne—Jan. 19 (2); April 5† (2); May 24 (2).

Johnston—Feb. 16† (2); Mar. 8 (1); April 19† (2).

Lee—Mar. 22 (1); May 3 (1).

FIFTH JUDICIAL DISTRICT

Spring Term, 1920—*Judge Connor.*

Craven—Jan. 5* (1); Feb. 2 (2); April 5 (1); May 10 (1); May 31* (1).

Pitt—Jan. 12† (1); Jan. 19 (2); Feb. 16† (1); Mar. 15 (2); April 12 (2); May 17 (2).

Greene—Feb. 23 (2); June 21 (1).

Carteret—Mar. 8 (1); June 7 (2).

Jones—Mar. 29 (1).

Pamlico—April 26 (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1920—*Judge Kerr.*

Duplin—Jan. 5† (2); Jan. 26* (1); Mar. 22† (2).

Lenoir—Jan. 19* (1); Feb. 16† (2); April 5 (1); May 17* (1); June 7† (2).

Sampson—Feb. 2 (2); Mar. 8† (2); April 26 (2).

Onslow—Mar. 1 (1); April 12† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1920—*Judge Daniels.*

Wake—Jan. 5* (1); Jan. 26† (1); Feb. 2* (1); Feb. 9† (1); Mar. 1* (1); Mar. 8† (4); April 12 (3); May 3* (1); May 17† (4). For accuracy refer to laws of 1919. There seems to be confusion.

Franklin—Jan. 12 (2); Feb. 16 (2); May 10 (1).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1920—*Judge Guion.*

New Hanover—Jan. 12* (1); Feb. 2† (2); Mar. 22* (1); Mar. 29† (3); May 3* (1); May 17† (2); June 7* (1). The statute seems to be confusing.

Pender—Jan. 19 (1); Mar. 3† (2); May 31 (1).

Columbus—Jan. 26 (1); Feb. 16† (2); April 19 (2).

Brunswick—Mar. 15 (1); June 14† (1).

NINTH JUDICIAL DISTRICT

Spring Term, 1920—*Judge Allen.*

Bladen—Jan. 5 (1); Mar. 8* (1); April 19† (1).

Cumberland—Jan. 12* (1); Feb. 9† (2); Mar. 15† (2); April 26† (2); May 24* (1).

Hoke—Jan. 19 (1); April 12 (1).

Robeson—Jan. 26* (1); Feb. 23† (2); Mar. 29 (2); May 10† (2).

TENTH JUDICIAL DISTRICT

Spring Term, 1920—*Judge Calvert.*

Durham—Jan. 5† (2); Feb. 23* (1); Mar. 8† (2); April 26† (1); May 17* (1); June 14 (1).

Alamance—Jan. 19† (1); Mar. 1* (1); May 24† (2).

Person—Feb. 2 (1); April 19 (1).

Granville—Feb 9 (2); April 5 (2).

Orange—Mar. 29 (1); May 3† (1 .

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Ray.*

Forsyth—Jan. 5 (2); Feb. 9† (2); Mar. 8† (2); Mar. 22* (1); May 17† (3).
Rockingham—Jan. 19* (1); Feb. 23† (2); May 10 (2); June 14† (2).
Surry—Feb. 2 (1); April 19 (2).
Caswell—Mar. 29 (1).
Ashe—April 5 (2).
Alleghany—May 3 (1).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge McElroy.*

Guilford—Jan. 12† (2); Jan. 26* (1); Feb. 9† (2); Mar. 8† (3); April 12† (2); April 26* (1); May 10† (2); June 7† (1); June 14* (1).
Davidson—Feb. 23 (2); May 3† (1); May 24 (1).
Stokes—Mar. 29* (1); April 5† (1).

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Bryson.*

Richmond—Jan. 5* (1); Mar. 15 (1); April 5* (1); Mar. 24† (1); June 14† (1).
Anson—Jan. 12* (1); Mar. 1† (1); April 12 (2); June 7† (1).
Moore—Jan. 19* (1); Feb. 9† (1); May 17† (1).
Union—Jan. 26 (1); Feb. 16† (2); Mar. 22 (1); May 3† (1).
Stanly—Feb. 2† (1); Mar. 29 (1); May 10† (1).
Scotland—Mar. 8† (1); April 26* (1); May 31 (1)

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Lane.*

Mecklenburg—Jan. 5* (2); ?Feb. 2 (6); Mar. 15* (1)?; Mar. 22* (1); Mar. 29† (2); April 26† (2); May 10* (1); May 17 (1)?; May 24† (1); June 7* (1); June 14 (1).
Gaston—Jan. 12† (1)?; Jan. 19† (2); Mar. 15* (1)?; April 14* (1); May 17* (1).

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Shaw.*

Cabarrus—Jan. 5 (2); April 19 (2).
Montgomery—Jan 19* (1); April 5† (2).
Iredell—Jan. 26 (2); May 17 (2).
Rowan—Feb. 9 (2); Mar. 8† (1); May 3 (2).
Davie—Feb. 23 (2).
Randolph—May 15† (2); Mar. 22* (1).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Adams.*

Lincoln—Jan. 26 (1).
Caldwell—Feb. 23 (2); May 17† (2).
Burke—Mar. 8 (2).
Cleveland—Mar. 22 (2).
Polk—April 12 (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Harding.*

Wilkes—Jan. 19† (1)?; Jan. 26 (1); Mar. 8 (2); May 31 (1)?.
Catawba—Feb. 2 (2); May 3† (2).
Alexander—Feb. 16 (1).
Yadkin—Mar. 1 (1).
Watauga—Mar. 22 (2).
Mitchell—April 5 (2).
Avery—April 19 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Long.*

McDowell—Jan. 19† (2); Feb. 16 (2).
Rutherford—Feb. 2† (2); April 26 (2).
Henderson—Mar. 1 (2); May 24 (2).
Yancey—Mar. 22 (2).
Transylvania—April 12 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Webb.*

Buncombe—Jan. 12 (3); Feb. 2† (3); Mar. 1 (3); Mar. 29 (2); May 3 (3); May 31† (3).
Madison—Feb. 23 (1); Mar. 22 (1); April 19 (2); May 24 (1).

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1920—*Judge Cline.*

Haywood—Jan. 5 (2); Feb. 2 (2); May 3† (2).
Cherokee—Jan. 19 (2); Mar. 29 (2).
Jackson—Feb. 16 (2); May 17† (2).
Swain—Mar. 1 (2).
Graham—Mar. 15 (2).
Clay—April 12 (1).
Macon—April 19 (2).

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*Criminal cases. †Civil cases. ‡Civil and jail cases

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, *Judge*, Wilson.
Western District—JAMES E. BOYD, *Judge*, Greensboro.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. ASHE, Clerk.

Elizabeth City, second Monday in April and October. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. .... Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. T. M. TURRENTINE, Deputy Clerk, Wilmington.

Laurinburg, last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

T. D. WARREN, United States District Attorney, Wilmington.

E. M. GREENE, Assistant United States District Attorney, New Bern.

GEORGE H. BELLAMY, United States Marshal, Raleigh.

S. A. ASHE, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Greensboro, first Monday in June and December.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

WILLIAM C. HAMMER, United States District Attorney, Asheboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1919

W. H. GALLOP v. ELIZABETH CITY MILLING COMPANY ET ALS.

(Filed 10 September, 1919.)

1. **Mortgages—Crops—Descriptive Words, "Etc."—Vendor and Purchaser.**

   A mortgage by the cropper of his "Irish and sweet potatoes, corn, etc.," grown on his land, sufficiently identifying the lands, is sufficient to include cotton raised thereon, the words "etc." or "et cetera" meaning other crops, especially when it is further described as "being one-half the crop grown on said lands"; and when the mortgage has been registered in the proper county the mortgagee may recover them from the purchaser of the mortgagor.

2. **Pleadings—Complaint—Cause of Action—Objections and Exceptions—Allegations—Mortgages—Registration—Vendor and Purchaser.**

   An exception to the sufficiency of the complaint to state a cause of action may be taken, for the first time, in the Supreme Court, on appeal; but where the action is by the mortgagee to recover of a purchaser of the mortgagor goods sold subject to a registered mortgage, the allegation is unnecessary that the goods were sold subsequent to the registration of the instrument, though, in this case, it is *held* that the allegation that the mortgage was "duly registered" is sufficient *if* such allegation were necessary.

APPEAL by plaintiff from *Devin, J.*, at March Term, 1919, of CURRITUCK.

This was an action by plaintiff to recover $295.20, the value of certain cotton sold to the defendant, the Elizabeth City Milling Company, by one A. Cherry, against whom the plaintiff held a mortgage.

The complaint alleged that the mortgage was duly recorded in Currituck. At the trial the defendant demurred *ore tenus* and moved to dismiss upon the ground that the complaint did not state a cause of action. A copy of the mortgage was set out in full as a part of the complaint.

The demurrer was sustained, and the plaintiff appealed.

Aydlett, Simpson & Sawyer for plaintiff.
Thompson & Wilson for defendant.

CLARK, C. J. The mortgage described the property as follows: "My entire crop of Irish and sweet potatoes, corn, etc., grown in the year 1916 on the lands of Thomas Harris, being one-half of the crop grown on said land." This was a sufficient description. It was not necessary to mention in detail every article of the crop. The words "Irish and sweet potatoes, corn, etc.," were sufficient to indicate that all the crop of every description was embraced in the mortgage, and that the lien was not limited to the articles specifically named.

The description of the land on which the crop was to be raised was "the lands of Thomas Harris," and certainly extended to the crops raised by the mortgagor during 1916 on the lands of said Harris in the county of Currituck, in which the mortgage was registered.

The word "etc." or "et cetera" means other crops. In *R. R. v. Metcalf,* 81 Am. Dec., 541, it was held that a resolution of the board of directors of a railroad company authorizing a mortgage of the road and its property, "etc.," embraced its franchises, rights, and privileges. Besides, in this case the clause at the end, "being one-half of the crop grown on said lands," clearly indicated an intention that the mortgage should embrace one-half of the crops of every description.

The point was further taken in this Court, though not raised by exception on the trial, that the complaint was insufficient in that it did not recite that the mortgage was registered before the cotton was bought by the mill company. If the complaint on this ground did not state a cause of action the exception could be taken for the first time in this Court, of course, but the allegation that the mortgage was "duly registered" would indicate that it was registered in due time. Indeed, a failure to allege that it was registered at all would not be fatal.

Reversed.

A. B. NEWBERN v. J. M. NEWBERN.

(Filed 10 September, 1919.)

Deeds and Conveyances — Equity — Correction — Trusts—Mortgages—Evidence.

A deed absolute upon its face may not be declared a mortgage by the courts in the absence of allegation and proof that the redemption clause had been omitted by mistake or that it had been induced by fraud and under advantage taken; and where the grantor was competent to fully understand the instrument, had kept it a week before signing, though spoken of in the letter of transmittal as a deed in trust "as per agreement," he is bound by his deed, and his testimony that the grantee and himself had agreed that it should be given to secure a loan, is insufficient to convert it into a mortgage.

APPEAL by plaintiff from *Bond, J.*, at January Term, 1919, of CURRITUCK.

Thompson & Wilson and Meekins & McMullan for plaintiff.

Ehringhaus & Small, Aydlett, Simpson & Sawyer and A. M. Simmons for defendant.

CLARK, C. J. This was an action by the plaintiff against his brother to convert a deed absolute on its face into a mortgage. In the original complaint there was no allegation that the clause of redemption was omitted by mistake. The amended complaint alleges that "by mistake of the draftsman who drew this paper-writing the clause of redemption was omitted therefrom," and "that by reason of the ignorance or the mutual mistake of the parties or the mistake of the plaintiff, and fraud or undue advantage of the defendant, the said clause of redemption was omitted from said writing."

There was testimony by the plaintiff that he and his brother had agreed that the defendant should loan him money in addition to sums already loaned, and that the defendant should be secured by a conveyance of the plaintiff's interest in the lands conveyed by the father to them and their other brothers in remainder after his life estate, and that this agreement was made in North Carolina on plaintiff's visit here, and that he afterwards returned to Oklahoma where he was then residing and still resides; that thereafter the defendant sent the deed in question to the plaintiff, enclosed in an envelope, with a letter stating that it was a deed in trust drawn according to the agreement, and that the plaintiff and his wife executed the deed and returned it to the defendant. It was recorded immediately. This action was not begun until 18 September, 1916.

The defendant denied these allegations, and also pleaded the laches of the plaintiff as well as the three- and ten-year statutes of limitations. The court directed a judgment of nonsuit.

There was no evidence of a mutual mistake nor of a mistake induced by fraud. It appears by the plaintiff's testimony that he was a man of education, having spent two years at Randolph-Macon College, and that at the time of signing the deed he was a man of maturity and older than his brother, the defendant.

In *Taylor v. Edmunds,* 176 N. C., 328, the Court said: "The mere fact that a grantor who can read and write signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off his guard by the grantee's false statements and assurances, designedly made at the time and reasonably relied on by him."

There are many other cases to the same effect, but in all of them there is a clear statement that there must be evidence either of "fraud in the factum," that is, an inducement to sign by "trick or device," such as placing the instrument along with several others, as in *Taylor v. Edmunds,* 176 N. C., 325, or evidence of positive misrepresentation designedly made and reasonably relied upon.

In all other cases the negligence of the party signing the deed to read the same when he had opportunity to so do will bar the assertion of his equity, *"vigilantibus non dormientibus aequitas subvenit." Dellinger v. Gillespie,* 118 N. C., 737, and cases cited thereto in Anno. Ed. In this case, as in that, it may be said: "It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it."

In this instance the defendant was not present, but when the deed was signed, 2,000 miles away, and the plaintiff had full opportunity to examine it. It does not appear in the testimony that there was any positive misrepresentation made and reasonably relied upon by the plaintiff. The only evidence relied on is the plaintiff's testimony that in the letter in which the defendant sent the deed he stated that he "had enclosed the deed of trust drawn as per his agreement." He did not produce such letter, and it appears from his testimony that he kept the paper in hand a week before signing. He was a man of education and the opening words of the paper are "This deed," printed in extra large type.

"In order to correct a deed which is absolute on its face, and to convert it into a security for debt, it must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage," and the intention must be established by proof, not merely of declarations, but of facts, *de hors* the deed, inconsistent with the idea of an absolute purchase. *Sowell v. Barrett,* 45 N. C., 50, citing *Streator v. Jones,* 10 N. C., 423; *Kelly v. Bryan,* 41 N. C., 283, and saying that "otherwise, titles evidenced by solemn deeds would be at all times exposed to the *slippery memory of witnesses.*"

To the same effect is *Brown v. Carson,* 45 N. C., 274, and the citations to that case, and to *Kelly v. Bryan, supra,* in the Anno. Ed. Also the most recent cases, *Newton v. Clark,* 174 N. C., 393, and *Williamson v. Rabón,* 177 N. C., 303, which are hereby cited and reaffirmed.

The judgment of nonsuit is

Affirmed.

A. W. ROUGHTON v. B. F. DUNCAN ET ALS.

(Filed 10 September, 1919.)

Interpleader—Partition—Title—Funds in Court—Clerks of Court—Timber—Injunction—Pleadings.

Where an order restrained defendant, in possession of land, from cutting the timber thereon till the final hearing, in proceedings to partition it, involving title, and the order has been modified, by consent, so as to permit the defendant to continue to cut the timber upon condition that the money for the timber cut should be paid into the hands of the clerk of the Superior Court awaiting final disposition of the action, an order permitting a third party to intervene and claim the fund under a superior title is not erroneously entered; and without alleging any cause of action against either of the original parties, he may recover the fund in the hands of the clerk upon proving his title, as claimed by him.

APPEAL by plaintiff from *Devin, J.,* at August Term, 1919, of TYRRELL.

This action was instituted on the 27th day of June, 1916, to have a sale for partition of the lands described in the complaint and to compel an accounting by the defendant of the timber cut from the said lands. The plaintiff alleged that he was the owner of three-fifths undivided interest in the said lands, and that the defendant was the owner of the remaining two-fifths interest. At the time summons issued a temporary restraining order was also issued enjoining the defendant from further cutting upon said lands. At that time the original defendants, Duncan and Pritchard, were in actual adverse possession of the said lands, claiming title thereto; the latter cutting the timber under a contract with the former, and delivering the same, also under contract, to the Southern Roller Stave and Heading Company. On 20 July, 1916, the cause coming on again to be heard, the restraining order was modified by consent so as to permit the defendants to continue cutting upon the condition that the money for the timber cut, both before and after the institution of the action, be paid by said company into the hands of the clerk of the Superior Court of Tyrrell County to await the determination of the action. Under the terms of this order the following payments were made to the said clerk by the said company:

August 1, 1916	$124.85
September 12, 1916	82.41
September 28, 1916	4.31
October 30, 1916	119.07

At November Term, 1916, one B. F. Spruill, son-in-law of Duncan, upon his own *ex parte* application made upon affidavit, stating that he claimed to be owner of the *locus in quo*, and asking to be made a party defendant, was permitted by the court to intervene and become a party defendant to said suit. On 10 September, 1917, Spruill filed a pleading in which it appeared that he claimed to own the lands in hostility to both plaintiff and defendant upon an alleged paramount and independent title. At October Special Term, 1917, and at November Term, 1917, orders were made in the cause allowing "time to amend pleadings." At Spring Term, 1918, of said court, Spruill having failed to amend his pleadings so as to allege any cause of action connected with either the plaintiff or defendant, plaintiff, after due notice, moved to strike out the order of the court allowing Spruill to intervene, and also to strike out the pleading filed by Spruill in consequence of such order. Motion denied, and plaintiff excepted. Upon the trial Spruill, intervenor, introduced a chain of paper title deraigned from the State and vesting in Spruill on 2 August, 1916, by deed from John L. Roper Lumber Company.

At the conclusion of the intervenor's testimony, and also at the conclusion of the whole evidence, plaintiff moved for judgment as of nonsuit. Motion denied, and plaintiff excepted. Judgment rendered as appears in the record, to which plaintiff excepted and appealed to the Supreme Court.

Meekins & McMullan attorneys for plaintiff.
Ehringhaus & Small attorneys for intervenor.
Aydlett, Simpson & Sawyer and B. F. Duncan for defendant.

ALLEN, J. The case of *McNair v. Pope,* 104 N. C., 351, is decisive against the plaintiff on both questions presented by the appeal.

In that case the action was commenced in 1885 to establish a parol trust, and pending the action a receiver was appointed, who collected certain rents and profits from the land, which he held subject to the order of the court, and A. and W. McQueen were allowed to intervene for the purpose of claiming the rents and profits against both parties to the action under an agricultural lien executed in 1886, and it was held that "His Honor very properly allowed A. and W. McQueen, the agricultural lienees, to intervene and assert their alleged rights in the fund held by the receiver," and that it was clear "that the lienees are entitled to be paid for any advances, etc."

Affirmed.

GEORGE W. HARRIS v. W. D. HARRIS ET ALS., HEIRS OF W. S. HARRIS.

(Filed 10 September, 1919.)

1. **Trusts—Evidence—Deceased Persons—Parol Trusts—Resulting Trusts.**

   Testimony of a witness, disinterested in the result of the suit, that defendant's ancestor, under whom the plaintiff claims the land in controversy, told the witness, while the deceased and the plaintiff were together, that the land had been bought by himself and plaintiff, that each owned one-half, etc., is sufficient for the jury to find a resulting trust in plaintiff's favor under a deed taking title to the deceased alone, and not objectionable as a transaction or communication with a deceased person, forbidden by the statute.

2. **Trusts—Parol Trusts—Deceased Persons—Evidence—Objections and Exceptions—Appeal and Error.**

   In a suit to establish a resulting trust in lands under a deed conveying title to the deceased, under whom defendant claims, an exception to the plaintiff's testimony on the ground of being objectionable as a transaction or communication with a deceased person must show, on appeal, when objection was made, such a transaction or communication as is prohibited by the statute, and his testimony, "We bought the land," etc., does not constitute reversible error when a part only of the testimony, the other part of which is competent and not separated, and made the sole ground of the exception.

3. **Statutes—Deceased Persons—Evidence—Witnesses—Interest in Result.**

   A witness who has never claimed and who has no interest in the title to lands, the subject of a suit to establish a resulting trust therein, under a deed to the defendant's deceased ancestor, has no interest in the result of the suit, and is not disqualified under our statute to testify as to transactions or communications with a deceased person.

4. **Trusts—Parol Trusts—Resulting Trusts—Evidence—Presumptions—Instructions.**

   Where there is evidence that the defendant's deceased ancestor, under whom he claims land, the subject of a suit to establish a resulting trust by parol, acquired the title with one-half of the purchase money paid to him by the plaintiff, the presumption is, nothing else appearing, that he acquired the title for himself and the plaintiff in equal interest, and where the form of the issue calls for a finding as to the intention of the parties in that respect, a charge of the court that the jury must find from the evidence, clear, cogent and convincing, that the plaintiff not only furnished one-half of the purchase money, but that the deceased acquired the title to be held, as to one-half, in trust for plaintiff, is not objectionable as excluding from the consideration of the jury, when the charge is read as a whole, the intention to create a trust. *Summers v. Moore*, 113 N. C., 394, cited and applied.

5. **Instructions — Interpretation — Fragmentary Parts — Jurors—Presumptions.**

A charge of the court to the jury must be naturally and reasonably construed as a whole, giving effect to every essential part of it, and not disconnectedly, and upon the assumption that the jurors are men of understanding and intelligence.

ACTION tried before *Devin, J.*, and a jury, at May Term, 1919, of HYDE.

Plaintiff sought to have established a resulting trust as to one undivided interest in a tract of land, which he alleges was purchased by him and his brother, W. S. Harris, the deed having been made to the latter for their joint benefit, and that he paid one-half of the purchase money.

The jury found for the plaintiff upon the following issues:

1. Was half of the purchase money expended in buying the McGowan land described in the complaint, furnished by plaintiff, George W. Harris, and did Sanford Harris take a title to same to hold one-half interest in same in trust for the benefit of George W. Harris, as alleged? Answer: "Yes."

2. Is plaintiff, George W. Harris, owner of one-half of the fund on deposit in the Bank of Hyde to credit of Sanford Harris at the time of his death? Answer: "Yes."

Judgment was entered for the plaintiff, and defendant appealed.

Ward & Grimes for plaintiff.
Spencer & Spencer, S. S. Mann and John G. Tooly for defendants.

WALKER, J., after stating the case: There was sufficient evidence of the trust, apart from the following testimony of Gray Credle: "I worked with the two Harrises, Mr. Sanford and George. I know the McGowan land and the homestead, know when they bought it. I cut the ditch for him. They cleaned the ditch off and hired me to cut it. Mr. Sanford set along the ditch bank and told me this is the land I and brother George bought, one-half is his and the other is mine. He was talking about the McGowan land. I cut the ditches for them and they cleared up the land crops. They hauled them and put them in one barn. I cut the ditch on the land that Mr. Sanford Harris said he and Mr. George bought. Mr. Sanford Harris told me because I was doing the ditching for him. The old man handed me the money for cutting the ditch—Mr. Sanford Harris; I don't know whose money it was; one spoke at the time, and they were both together. Mr. George Harris and Mr. Sanford said they had a ditch for me to cut."

There are exceptions to evidence upon the ground that certain answers of the plaintiff, as his own witness, related to transactions and communications with his deceased brother, W. S. Harris. The testimony covered by the exceptions 1 and 2 did not show, on its face, such a transaction or communication. The testimony of Richard Howard, afterwards given, does not show its incompetency under Revisal, sec. 1631, when properly considered. If there was a transaction or communication between plaintiff and the deceased it should have appeared to be so when the objection was made, so that the court could rule intelligently upon it. As we view it, the testimony was admissible. The exception which refers to the use of the word "we" in the sentence, "It was before *we* bought the next spring," must be overruled, because that sentence is a part of a mass of testimony, some of which was plainly competent, and the particular sentence was not separated from the rest of the statement and made the sole ground of exception. *S. v. Ledford,* 133 N. C., 714, and *Nance v. Telegraph Co.,* 177 N. C., 313, where the cases are collected. *Stocks v. Cannon,* 139 N. C., 60, does not apply.

We do not see how Jesse Harris was interested in the result of this action (*Brown v. Adams,* 174 N. C., 496), or how his interest, or any he ever had, could be affected favorably by his testimony. The facts seem to show, on the contrary, that his testimony was, in one aspect of the case, unfavorable to himself, and therefore he was not disqualified. *Bunn v. Todd,* 107 N. C., 266. Plaintiff derives his title or interest to the property in dispute under the agreement between him and his brother, W. Sanford Harris, and not under the witness. *Bunn v. Todd, supra; Mull v. Martin,* 85 N. C., 406. There are other answers to the objections not necessary to be considered.

Upon the question of nonsuit we are of the opinion that there was evidence as to the trust for the consideration of the jury. Among other testimony we may refer to that of Gray Credle, which seems to be not only some evidence, but very full and sufficient evidence, of the trust.

We do not agree with the learned counsel that the judge excluded from the consideration of the jury the intention to create a trust, in favor of the plaintiff, as to one-half interest in the land. The form of the issue called for a finding as to this intention, and we also think that the charge includes it as an element of the equity, which is sought to be established by the plaintiff. The jury say that one-half of the purchase money was furnished by the plaintiff, and that Sanford Harris acquired the legal title in trust to hold one-half interest in the land for his benefit. This is sufficiently clear as to the intention of the parties.

The court charged substantially that the jury must find from evidence, which is clear, cogent and convincing, that George Harris, the plaintiff, not only furnished one-half of the purchase money, but that Sanford Harris acquired the title, which was to be held, as to one-half interest in the land, in trust for the plaintiff.

Bispham on Equity (9 Ed.), sec. 80, states that resulting trusts are substantially divided into four classes. It is then said that the nature of resulting trusts of the first of these classes, that is, where one pays the purchase money but takes the title in the name of another, was clearly explained by *Lord Chief Baron Eyre* in *Dyer v. Dyer,* 2 Cox, 92 (1 Lead. Cases in Eq., 4 Eng. Ed., 165, 203), it being there held, as the clear result of all the cases, without a single exception, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successively, results to the man who advances the purchase money. To illustrate the doctrine thus stated, suppose A. advances the purchase money of an estate, and a conveyance of the legal interest in it is made either to B. or to B. and C., or to A., B. and C. jointly, or to A., B. and C. successively. In all these cases, if B. and C. are strangers, a trust will result in favor of A. "The reason of this doctrine is that the man who pays the purchase money is supposed to become, or to intend to become, the owner of the property, and the beneficial title follows that supposed intention. This doctrine is an analogy to the common-law rule that where there is a feoffment without consideration the use will result to the feoffor. It applies to both realty and personalty, and trusts of this nature are expressly excepted out of the statute of frauds. The person in whose favor a trust is claimed to result must pay the purchase money as his own; if he merely advances it as a loan, no trust will result. Where money is advanced and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. A resulting trust of this kind must arise, if at all, from the payment of the purchase money at the time of the conveyance. If the purchase money is paid by several, and the title taken in the name of one, a trust will result to the others in proportion to the amount paid by each. But to create a resulting trust in such a case the payment must be of some definite part of the purchase money." The annotator of this text cites, in its support, *Summers v. Moore,* 113 N. C., 394 (op. by *Shepherd, Ch. J.*), which states the doctrine in substantially similar language. The rule is well stated in the first two head-notes as follows:

"1. Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another at the same time or previously, and as part of the same transaction, the parties being strangers to each other, the presumption, in the absence of rebutting circumstances, is that he who supplies the money intends the purchase for his own benefit and not for another, and that the conveyance in the name of the other is a matter of convenience and arrangement for collateral purposes, and a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.

"2. In such case the burden is upon him who claims the resulting trust, and as the law gives a peculiar force and solemnity to deeds, it will not allow them to be overthrown by mere words but only by facts strong, clear and unequivocal."

It will be perceived from this statement of the law that the trust is based upon the presumed intention of the party arising from the payment of the purchase money or his share of it, and the court in this case substantially followed the rule in its charge to the jury.

There was ample evidence to show a contribution to one-half of the purchase money, and also evidence from which the jury could reasonably infer that Sanford Harris had bought the land in trust to hold, as to one-half interest therein, for the plaintiff. This evidence consisted, in part, of his own declarations or admissions tending to prove such a transaction before the purchase, or such an intention of the parties at the time, that he should hold the title, not for himself as the sole owner of the land, but for their joint and equal benefit, and the judge evidently referred to this evidence when he gave the instruction as to what would constitute such a trust, and as to the quantum of proof. The charge must be read as a whole, giving effect to every essential part of it, and not disconnectedly; it must have a natural and reasonable construction, and should be considered upon the supposition that the jurors are men of understanding and intelligence. *S. v. Exum,* 138 N. C., 599; *Kornegay v. R. R.*, 154 N. C., 389, and *Bradley v. Mfg. Co.*, 177 N. C., 153, citing other cases.

The other exceptions are either formal or without merit.

No error.

A. C. LATHAM ET AL. v. SAMUEL W. LATHAM.

(Filed 10 September, 1919.)

1. **Venue—Statutes—Jurisdiction.**

   The venue of a civil action is controlled by statute, and the procedure is not jurisdictional in the absence of statutory provision to that effect.

2. **Executors and Administrators—Actions—Venue—Statutes.**

   Revisal, sec. 415, provides that the action against a deceased party may be continued by or against his representative or successor in interest, and Revisal, sec. 417, requires that, in such instances, the summons shall be returnable before the clerk and in effect the action shall be ready for a speedy trial, thus recognizing the continuity of the action and the trial thereof in the county in which it had been brought; and Revisal, sec. 421, relative to actions against the administrator or personal representative of a deceased defendant, or any surety, etc., does not control the venue in such matters.

3. **Statutes—Interpretation—Changes of Phrases.**

   The sections of the Revisal upon the same subject-matter must be construed in connection with each other, as a whole and not in part, in order to ascertain the legislative will, when apparent inconsistencies are to be reconciled; and a change of phraseology may raise a presumption of a change of meaning.

4. **Same—Venue—Executors and Administrators—"Instituted"—Statutes—Actions.**

   Revisal, sec. 421, as to the venue of an action upon official bonds and against executors and administrators, requiring that such actions shall be "instituted," that is commenced, in the county therein specified, has no application where an action has been commenced in another county against a defendant, who has since died, and his administrator has been made a party, the word "instituted" used in this section being different from that used in the other sections of the Revisal that specify where the actions are to be "tried." Revisal, secs. 419, 420.

APPEAL by Carrie W. Hancock, Exrx., from *Devin, J.*, at April Term, 1919, of BEAUFORT.

This was a civil action instituted in the Superior Court of Beaufort County, in October, 1916, to recover for alleged conversion by Samuel W. Latham of the proceeds of the sale of certain lands. The action was commenced in the right county.

Complaint was filed 27 December, 1917. No answer was filed.

Shortly thereafter, on the .... day of ...., 1918, Samuel W. Latham died, leaving a last will and testament, naming Carrie W. Hancock executrix without bond.

The will was probated in Craven County and Carrie W. Hancock qualified as executrix.

At October Term, 1918, an order was made directing that said Carrie

W. Hancock, as executrix and individually, be made a party defendant to the suit. Pursuant thereto summons was issued returnable to November Term, 1918.

At November Term, 1918, Carrie W. Hancock, executrix, appeared and filed her motion to remove the suit to Craven County, as a matter of law, under the provisions of Revisal, sec. 421. The motion was denied, and the executrix appealed.

E. A. Daniel, Jr., and Small, MacLean, Bragaw & Rodman attorneys for plaintiff.

Guion & Guion and Moore & Dunn attorneys for defendant.

ALLEN, J. The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. *Cooperage Co. v. L. Co.,* 151 N. C., 456.

It deals with procedure and is not jurisdictional, in the absence of statutory provision to that effect. *McCullen v. R. R.,* 146 N. C., 568.

When we turn to the statutes we find in Revisal, sec. 415, that in case of death of a defendant the court "may allow the action to be continued by or against his representative or successor in interest," and section 417 requires the summons to the personal representative to be returnable before the clerk, and not in term, "Commanding him to appear before him on a day to be named in said summons, which shall be at least twenty days after the service thereof, and answer the complaint, and the issue joined by the filing of the said answer shall stand for trial at the term of the Superior Court next following."

These sections clearly recognize the continuity of the action and the right to have it tried where instituted, and to avoid delay the personal representative must appear before the clerk and answer so that the issues may be tried at the next term, thus showing that no right of removal was contemplated, because of the requirement to answer and be ready for trial before the term at which he would have to make his motion to remove.

The executrix says, however, that the question is controlled by Revisal, sec. 421, which is as follows: "All actions upon official bonds or against executors and administrators in their official capacity shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county."

This section must be construed in connection with the other sections of the Revisal, the whole and not a part representing the legislative will (36 Cyc., 1167), and apparent inconsistencies must be reconciled, and when so considered it must be held that the latter section refers to original actions instituted against the personal representative, as its language, standing by itself, indicates.

It says that actions against executors and administrators "shall be instituted in the county, etc.," not tried; and "institute, when applied to legal proceedings, signifies the commencement of the proceedings, when we talk of instituting an action we understand bringing an action." Words and Phrases, Vol. 4, 3661.

A similar question was considered in *Trust Co. v. Kauffman,* 108 Cal., 222, in which a local action was brought in the proper county, but before trial the subject-matter was transferred by legislative act to another county, and a motion to remove to the latter county was made. The motion was denied, and the court, in its opinion, uses language very pertinent in the construction of the statute now before us. It says: "The Constitution, Art. VI, sec. 5, declares that 'All actions for the enforcement of liens' shall be commenced in the county in which the real estate or some portion thereof is situated; and at the time this action was 'commenced' the property was situated within the boundaries of San Diego. The Constitution does not, however, require that the action shall be 'tried' in the county in which the property is situated."

The same principle was applied in *Blake v. Freeman,* 13 Me., 134; *University v. R. R.,* 49 Wis., 161, and in *Hannan v. Power Co.,* 173 N. C., 522, the Court saying in the latter case, "The question of venue is governed by the laws at the commencement of the action."

It is also a rule of construction that a change in phraseology when dealing with a subject raises a presumption of a change of meaning, and it appears that the General Assembly, when providing for the commencement and trial of actions, says, in section 419, "actions for the following causes must be tried in the county, etc."; in section 420, "actions for the following causes must be tried in the county, etc.," while in section 421, on which the executrix relies, nothing is said about the place of trial, and the language changes from "shall be tried" to "shall be instituted."

We are of opinion the motion to remove was properly denied.

Affirmed.

L. S. DANIELS AND L. W. COX v. SOUTHERN DISTRIBUTING COMPANY.

(Filed 10 September, 1919.)

1. Vendor and Purchaser—Sample—Carriers of Freight—Destroyed Shipment—Damages.

Where a consignee refuses a shipment because it did not come up to the samples by which it had been sold, and there is evidence that the consignor instructed him to ship it back if it did not, and it was destroyed while being retransported: *Held*, the consignor may recover the value of the destroyed shipment if it was in accordance with the sample, apart from the agreement, and a request for special instruction, that if the jury believed the evidence the plaintiff waived his right to recover by consenting to its return, is properly refused.

2. Appeal and Error—Issues.

It is not error for the court to submit issues tendered by a party to the action if the issues submitted have presented every phrase of the controversy.

APPEAL by defendant from *Devin, J.*, at December Term, 1919, of PASQUOTANK.

Early in 1918 Daniels & Cox, millers, at Elizabeth City, N. C., made a contract with Southern Distributing Company of Norfolk, Va., for the sale of five hundred bags of meal, to be shipped in 100-bag lots, to be delivered f. o. b. steamer, Elizabeth City. On 9 March, plaintiffs shipped defendant 100 bags meal via "Peoples Line." There were other shipments, but they are not concerned in this appeal. Upon receipt of the first shipment defendant declined to receive it on the ground that it did not come up to the contract, and L. S. Daniels, of plaintiff's firm, instructed C. E. Herbert, president of defendant, to ship the meal back, which he did. The steamer *Annie,* on which the meal was returned, was completely destroyed by an explosion a few hours after reaching Elizabeth City, and the meal was lost. Plaintiffs sue for the recovery of the value of the lost meal.

Verdict and judgment for plaintiffs. Appeal by defendant.

Aydlett, Simpson & Sawyer for plaintiffs.
W. A. Worth for defendant.

CLARK, C. J. The meal was sold by sample and when the first shipment (which alone is in controversy here) was received the defendant wired plaintiffs that it was not according to sample. The plaintiffs contended that it was as represented, but wrote the defendant that "if it was not up to sample the defendant might ship it back and the plaintiffs would pay the freight." The meal was not shipped back till 4 April.

The defendant had the right without plaintiff's consent to ship it back if it did not come up to sample, but not otherwise, and in that event should have done so promptly.

Mr. Herbert, president of the defendant and witness for the company, in his cross-examination stated, "In my wire to Mr. Daniels I told him that the meal did not come up to the contract, and he said that if it did not, to ship it back." There was a conflict of evidence whether the meal came up to the sample or not, but the jury find upon the issues submitted that this meal "in quality and fineness was as good as the sample," and that the plaintiffs did not by consenting to its return waive their right to recover therefor, and that the defendant did not reship to plaintiffs in a reasonable time.

The legal right of the defendant to reship depended upon whether the meal came up to the sample. The defendant's testimony is that the plaintiffs consented that it should be reshipped "if it did not." The jury having found upon the conflicting evidence that the meal did come up to the sample, the reshipment was made by the defendant in its own wrong, and the plaintiffs, not having received and accepted the same, are entitled to recover the purchase price.

The defendant's prayer, therefore, that if the jury should "believe all the evidence they should respond to the second issue that the plaintiffs, by consenting to the return of the first hundred bags of meal, waived their right to recover therefor," could not be given in view of the testimony of the defendant's president that the plaintiffs had directed him to ship it back "if it did not come up to the sample." It is immaterial to consider the controversy whether the defendant lost the right to reship by its delay.

The "issues submitted were sufficient to present every phase of the controversy," and it was not error to refuse to submit the issues tendered by the defendant. *Humphrey v. Church,* 109 N. C., 132, and cases therein cited and citations thereto in Anno. Ed.

No error.

MALACHI KEYS v. IVEY ALLIGOOD.

(Filed 10 September, 1919.)

1. **Contempt—Highways—Injunctions—Judgments—Punishment—Courts.**

Where a defendant has violated a preliminary injunction of a court having jurisdiction in a pending action, the court may, in proper instances, order the defendant to undo the wrongful act committed by him in violation of its order and also defer the judgment punishing him for the contempt committed by him, to give him a chance to repent his unlawful act.

2. **Contempt—Injunctions—Restoration—Mandatory Injunctions.**
Where the defendant has been enjoined until the final hearing in a pending action from obstructing a public highway, from which order he has not appealed, and has, in violation thereof, made changes in the highway contrary to the order, the court, after giving the defendant a proper hearing, has the power to issue a mandatory injunction to compel him to restore the road to its former condition.

3. **Injunctions—Contempt—Findings—Appeal and Error.**
A violation of an order enjoining a defendant from obstructing a public highway in violation of plaintiff's rights is in contempt of court, and on appeal the findings of fact by the Superior Court judge are not reviewable in a collateral proceeding.

MOTION heard by *Devin, J.*, on 8 May, 1919, in BEAUFORT.

The court had issued an order restraining the defendants from in any way interfering with a certain road, and on return of the order, and after hearing the evidence and the argument of counsel, the court granted an interlocutory injunction to the final hearing, forbidding the defendants from entering upon the premises or using the road except strictly for purposes of ingress and egress, as heretofore, and no more. There was no appeal from this order, and while the interlocutory injunction was pending and still in full force, it was alleged and shown before the judge that defendants had wilfully violated the same. Plaintiff thereupon asked for a mandatory injunction to compel the defendants to restore the former condition of things, and to desist from further interference with the road or its ditches, or from further disobeying the injunction. The court heard the parties, found that the injunction had been violated, and ordered the defendants to restore the ditch bank to the place from which they had removed it. This order is stated to have been made at the election of plaintiff, the court withholding the question as to the imposition of any penalty for disobedience. Defendants appealed.

No counsel for plaintiff.
Harry McMullan and John G. Tooly for defendants.

WALKER, J., after stating the case: It is somewhat difficult to understand from the record whether the court withheld the punishment for the contempt in violating the order until the defendants had reasonable time and opportunity to restore the ditch bank, or whether the mandatory injunction was issued absolutely and without regard to any alternative judgment in the way of punishment for the contempt. We rather favor the former construction of the order, but will consider it in both phases.

1. If the order was in the alternative, there can be no question as to the power of the court to make it. Before passing sentence of fine or imprisonment, the court had the undoubted right to give the defendants a chance to repent and undo the wrongful act committed by them in violation of its order.

2. But if the order is to be taken as one for a mandatory injunction, requiring the defendants to replace the ditch bank, we still think it was valid. The cases upon the power of the court to issue such an injunction before final decree are somewhat in conflict, but if proper distinctions are made we think they may be reconciled. Some of them, which hold that such a mandatory order cannot be issued until the final decree is passed, seem to refer to those instances where the alleged wrongful act was fully accomplished before the suit was commenced, and not to cases where the wrong ordered to be undone was itself in violation of an interlocutory injunction, as here. A learned and accurate text-writer has said that there would seem to be no good reason why, in a proper case, a mandatory injunction should not issue upon preliminary hearing. Gross violations of rights may occur in the shortest possible time, and a few hours' wrong-doing may result in the creation of an intolerable nuisance or in the production of an injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the chancellor ought to be most swift, and if the immediate relief afforded could not, in a proper case, be restorative, as well as prohibitory, no adequate redress would, in many instances, be given. Bispham's Pr. of Equity (9 Ed.), p. 638. And so it was held in *Murphey v. Harker,* 115 Ga., 77, that when one who has notice that an injunction has been granted against him, though he has not been formally served with the writ, does an act which is a violation of the injunction, and thus changes the status of the property involved in the case, the judge may at an interlocutory hearing, or upon an application for an attachment for contempt, require the offender to restore the status as it existed at the time he first received notice that the injunction had been granted. The Court, by *Justice Hall,* in *Robinson v. Woodmansee,* 76 Ga., 830, said it was not error to require that the defendant restore the status, as it existed at the time of the wrongful act, as it was but "a mild use of the judge's discretion." It is said in 1 High on Injunctions, at end of sec. 5, p. 10: "Where, before the granting of the injunction, the defendant has thus changed the condition of things, the court may not only restrain further action by him but may also, by preliminary mandatory injunction, compel him to restore the subject-matter of the suit to its former condition. And in so doing the court acts without any regard to the ultimate merits of the controversy." Mr. Bispham in his treatise on Equity (9 Ed.), sec. 400, at p. 637, says that

the inclination of the courts of this country was, at one time, against granting a mandatory interlocutory injunction, but that the "tendency, however, is now towards greater liberality in granting such applications," and that many occasions may arise which render a mandatory injunction necessary. In another part of that section he further says: "An injunction may, therefore, be said to be either mandatory or prohibitory. A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act. The jurisdiction of the court to issue such a writ has been questioned, but it is now established beyond doubt. 'This court,' said *Lord Justice Cotton* in *Loog v. Bean,* 'when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose.' The form of the order, however, was not, under the old practice, direct in its terms, but the end was reached by a writ apparently prohibitory. Thus an injunction that a defendant should deliver up books and papers in his possession had been issued in the prohibitive form. . . . This order, it will be observed, is in terms a restraining order, but in effect it is a command to the defendant to deliver up the books and papers. Under the modern practice the better form, perhaps, is that the decree should be not only in effect, but in terms, mandatory."

It has been conceded in many cases that such an injunction before the final hearing will be issued where, though mandatory in substance, it is prohibitory in form, but several text-writers and some of the judges have said that this is a distinction without any difference and should not longer exist. Hilliard on Injunctions, 8. It was said in *Bosley v. Susq. Canal,* 3 Bland's Ch. (Md.), at p. 66, that while a court of equity will not, in the first instance, command a thing to be done or to be undone by an injunction mandatory in form, yet where acts have been done in violation of an injunction it will order them to be undone or the matter restored. We can conceive of no sound reason why the court may compel a thing to be done or undone by a restrictive injunction, and not require the same thing of the defendant by an injunction mandatory in form. Of course, the defendants should be heard before the mandatory writ is issued, and it should be confined to those cases where it is necessary in order that the status quo may be preserved, but where a previous injunction has been violated we do not see why obedience to it should not be forced by a restoration of things to their former condition. It would be permitting a recalcitrant defendant to profit by his wrong done in contempt of an order forbidding it. Where it is the obstruction of a right of way, as here, there is no difference in ordering him to remove it and requiring him to desist from continuing it. The subject is fully discussed, and our view sustained, in *Vicksburg, etc., Rwy. Co. v. Webster, etc., Co.,* 132 La., 105, and in the note to that case as reported in 47 L. R. A. (N. S.), 1155.

Lord Eldon in one case, *Lane v. Newdigate,* 10 Vesey, 192, was of the opinion that he could not direct the thing specifically to be done, but that he could make an order which would indirectly have that very effect, which he accordingly did, stating how the order should be drawn, by making it restrictive in form, which *Lord Brougham,* commenting generally upon that kind of practice, considered as merely a "roundabout mode," the injunction not commanding anything to be done or undone, but simply that an injurious irregularity should not be permitted any longer to exist, regarding the continuance of the act as a repetition of it. In these days we have found what we deem to be a better method and look rather to the substance than to the form of things, as being a more direct, simple and effective way of dealing with the rights and remedies of litigants. We prefer the modern method, and the tendency of the courts, we are told, has strongly set in that direction.

Why not call this process by its right name instead of granting what is really mandatory, under the guise of preventive relief? When this is done, we are trying to deceive ourselves, for no good or practical reason, when we know what we are actually doing or what the inevitable effect will be. It is simply adherence to an old form and custom of the court of equity, which did not even gain the approval of some of its ablest chancellors. In modern times, since we try to call things by their true and appropriate titles, so we may be better understood, the decided trend of the courts, especially in this country, is towards a more sensible policy, as we have already shown by authority.

We must be careful to remember, in this connection, that whether the defendant in an injunction suit who violates the order should be punished for the contempt shown the court, concerns the court in the matter of the maintenance of its dignity and authority; but whether, by coercive or punitory measures, such defendant should be compelled to obey the writ issued by a competent court for the preservation of a civil right asserted by the plaintiff, concerns the plaintiff, and the action of the trial court on that question may be subject to review on appeal; but where the court has full jurisdiction in the premises, its findings of fact, as to the disobedience of its order, are not open to review in a collateral proceeding, such as *habeas corpus.* 14 Ruling Case Law, sec. 170; *Vicksburg, etc., R. R. Co. v. Webster, etc., Co.,* 132 La., 1051. Applying the foregoing principle to this case we find that there has been an open and defiant violation of the interlocutory injunction issued by the court. Rapalje on Contempts, sec. 41. The defendants have done what they were clearly prohibited from doing. If the *status quo* cannot be restored by a mandatory injunction, the orders of a court can easily be set at naught and valuable rights destroyed without commensurate redress. The party may be punished for contempt by fine or imprisonment, but this will not reinstate the former condition and be of no pecuniary benefit to the plaintiff. It is surely no adequate restoration of what he has lost by the defendants' wrongful act. If a party who has defied the court, and deliberately violated its order, cannot be made to yield full obedience to it by undoing what he has so flagrantly done, in contempt of the court, and in plain violation of the plaintiff's rights, the arm of the court has lost its boasted strength and its power to grant protective relief. But we do not admit that this has been the unfortunate result of the decisions, which appear to be growing more and more favorable to the doctrine that such an interlocutory injunction, mandatory in form and substance, may be granted, that is, before decree, when it is done to compel restoration where the wrong was committed by disobeying the order of the court.

This is not punishment for the contempt, not authorized by the statute, as contended by the defendants, but is merely a method of enforcing the court's order. As said in *Cromartie v. Comrs.,* 85 N. C., 215, when referring to the statute as to contempts: "It will be noticed that, throughout these latter portions of the statute, the proceeding is designated not as the former but a proceeding 'as for contempt,' and while regulating, not intended to deprive the court of its well-established jurisdiction to enforce obedience to its lawful orders as before possessed and exercised. 'Without the ability to compel obedience to its mandates,' say the Court in *Pain v. Pain,* 80 N. C., 322, 'whether the order be to surrender writings in possession of a party, to execute deeds of conveyance, to pay money, as in the present case, or to perform any other act the court is competent to require to be done, many of its most useful and important functions would be paralyzed.' The order here is coercive only upon persons capable of performing its requirement, and its force is exhausted by rendering obedience. There is, therefore, no excess of power apparent in the judgment." The order there was one for the imprisonment of the defendants until they complied with the former order of the court, and was not one for their punishment, by fine or imprisonment or both, for disobedience to such order. As here, it is simply coercive process. This distinction is also mentioned in the case of *In re Patterson,* 99 N. C., 407. Whether the court also will punish the defendants for the offense against its dignity and authority is left to its sound discretion.

We find no error in the record.

No error.

MARTHA L. LANCASTER v. G. Z. LANCASTER.

(Filed 10 September, 1919.)

Constitutional Law—Husband and Life—Lunatic—Statutes—Deeds and Conveyances.

The provisions of the Revisal, sec. 2116, dispensing with the necessity of the written consent of the husband to the conveyance by the wife of her lands when he has "been declared an idiot or a lunatic" is not inhibited by our State Constitution, Art. X, sec. 6, or in conflict with Revisal, sec. 1898, providing for proceedings by petition before the clerk to obtain an order of sale, the remedy given by these two sections being in the alternative, and optional by the wife as to which may be pursued.

APPEAL by defendant from *Bond J.,* at June Term, 1919, of EDGECOMBE.

The plaintiff was seized in her own right of the land described in the pleadings. Her husband having been declared a lunatic and being confined in the hospital at Raleigh, she contracted to sell the land to the defendant, who refused the deed tendered by the plaintiff upon the sole ground that she could not convey title thereto by a good and sufficient deed without the written assent of her husband. The court gave judgment for the plaintiff, and the defendant appealed.

F. S. Spruill and W. O. Howard for plaintiff.
H. D. Hardison for defendant.

CLARK, C. J. The sole question raised is whether or not the plaintiff, whose husband had been declared a lunatic, can, during the continuance of such lunacy, convey her land without the written assent of her husband, under sec. 2116 of the Revisal; in other words, whether or not this section is in violation of sec. 6, Art. X, of the Constitution.

This statute is clear and unambiguous. It provides, among other things, that "Every woman . . . whose husband shall have been declared an idiot or lunatic shall be deemed and held from the date . . . of such idiocy or lunacy, and during its continuance, a free trader, and shall have power to convey her personal and real estate without the assent of her husband." Every presumption is in favor of the validity of an act of the Legislature.

The very next section, Rev., 2117, provides that "Every woman whose husband shall abandon her or shall maliciously turn her out of doors shall be deemed a free trader . . . and shall have power to convey her personal estate and her real estate without the assent of her husband." This has been held valid in *Vanderford v. Humphreys,* 139 N. C., 65; *Finger v. Hunter,* 130 N. C., 531; *Brown v. Brown,* 121

N. C., 8; *Hall v. Walker,* 118 N. C., 377, all of which have been cited and approved recently by *Allen, J. Bachelor v. Norris,* 166 N. C., 508.

For a stronger reason, sec. 2116, authorizing the wife to convey when the husband is wholly unable by reason of mental incapacity, duly adjudged, to give his assent, is a valid exercise of the legislative power.

A reasonable construction must be put upon the constitutional provision. The husband's assent cannot be required when either by reason of mental incapacity he is unable to give assent, or by his conduct in abandoning his wife or maliciously turning her out of doors he has practically emancipated her, for in both cases she must rely upon her property or her labor for her support.

Section 2116 has been referred to in a number of cases as an exception to the constitutional provision which requires the assent of the husband, though not directly construed. In these cases it is stated that the husband's assent to the conveyance of the realty is required "except in cases under secs. 2116 and 2117." *Council v. Pridgen,* 153 N. C., 443; *Harvey v. Johnston,* 133 N. C., 352; *Sanderlin v. Sanderlin,* 122 N. C., 1; *Moore v. Wolfe, ib.,* 715; *Farthing v. Shields,* 106 N. C., 295; *Hodges v. Hill,* 105 N. C., 130; *Flaum v. Wallace,* 103 N. C., 304; *Sparks v. Sparks,* 94 N. C., 527.

It is inconceivable that in either of these cases the wife should be debarred from using her own property when the husband by his abandonment of her or turning her out of doors, or by reason of his mental incapacity has left her to fight the battles of life alone. The Constitution could not have intended this, and we concur that the legislative construction as expressed in secs. 2116 and 2117 is reasonable and valid.

In *Hall v. Walker,* 118 N. C., 380, the Court said: "There is no constitutional inhibition on the power of the Legislature to declare where and how the wife may become a free trader. Cons., Art. X, sec. 6, was not intended to disable but to protect her."

It is true that Rev., 1898, provides that the wife of a lunatic owning real estate may proceed by petition before the clerk and obtain an order to sell the same. This is not in contradiction of sec. 2116, but is an optional alternative method to which the wife can resort if for any reason it should be desirable that in future the record of the deed should show that at the time of the conveyance the husband had been adjudged a lunatic. This would prevent the possible necessity of the grantee proving that fact at some future date.

If the Legislature could dispense with the literal requirement of "the assent of the husband" by the wife obtaining the leave of the clerk it could dispense with it, without his leave, upon the same state of facts. The order of the clerk is only a contemporaneous certificate that the husband had been adjudged insane at the time of the conveyance, and that the sale is to her interest in his judgment. The Constitution does not require the approval of the clerk. That is purely legislative and is dispensed with in the alternative method prescribed by Rev., 2116.

Rev., 2111, also provides that if the husband shall separate from his wife and live in adultery, or shall wrongfully abandon his wife, or if a divorce from bed and board shall be granted her, she may "sell and convey her real property as if she were unmarried."

Rev., 959, provides that when the wife is a lunatic the husband may convey his own land without her joinder, "free and exempt from the dower rights and all other interests of his wife," with exception only of a conveyance of the homestead.

The husband has no interest in the wife's land beyond a contingent right of curtesy if she makes no will. By Rev., 2116, the Legislature holds his "written assent" to her conveyance of her land unnecessary when there is a legal adjudication that the husband is insane and hence unable to give his assent. When he cannot give or refuse assent, the Legislature says he need not.

Affirmed.

J. A. DAVIS v. J. E. HARRIS.

(Filed 10 September, 1919.)

1. **Contracts— Writings— Statute of Frauds— Timber— Deeds and Conveyances.**

   The principle that contracts to cut and remove standing timber upon lands is not enforceable unless in writing applies only to executory contracts.

2. **Same—Breach—Damages.**

   Where a parol executory contract to cut and remove standing timber upon lands at a certain price has not been reduced to writing and signed by the parties, etc., the grantor may not maintain his action for damages upon the ground that his contract was for the cutting of all the merchantable timber, and that the defendant had only cut the select timber at the agreed price; but after the timber has been cut and removed from the land the plaintiff may either recover the full injury to the lands from the trees cut down or removed or the full value thereof, unless he had otherwise agreed.

3. **Same—Damages Minimized—Evidence.**

   Where an executory contract to cut timber standing upon lands is void because not in writing, etc., the grantor may recover damages to the land caused by the grantee's cutting certain trees thereon and permitting them to remain and rot, the severed trees being personalty; and though the grantor may be required to sell the trees to minimize his damages, he may prove an agreement of the grantee to take them at a certain price, as a reason why he has not done so.

APPEAL by plaintiff from *Bond, J.*, at June Term, 1919, of BUNCOMBE.

The plaintiff by oral contract sold to the defendant the mill timber on his land, the same to be measured and paid for at the rate of $6 per thousand feet before removal. The plaintiff admits that the defendant paid at that rate for all the timber cut and removed, but alleges that the defendant cut 163 other logs which he left lying upon the land. The plaintiff further alleges that the defendant agreed that he would cut all the merchantable timber on the land, but that on the contrary he picked out the best timber, which he removed and paid for.

The defendant denies these allegations. The plaintiff brings this action upon the ground that the defendant having picked out the best timber he is entitled to be paid a higher price for the same than $6 per thousand, and also to recover the value of the logs left upon the ground and not removed. The court nonsuited the plaintiff because the contract was not in writing.

G. M. T. Fountain & Son for plaintiff.
Allsbrook & Phillips for defendant.

CLARK, C. J. A contract to cut and remove timber is not enforceable unless in writing, *Mizell v. Burnett*, 49 N. C., 252. But this applies to executory contracts only.

It appears in the record that it is admitted by both parties that there was no contract or memorandum of sale in writing; that all trees cut by defendant and removed were measured and paid for at $6 per thousand, but that the defendant cut other trees which were not measured or paid for or removed from the land. It is controverted that the defendant promised to pay for them and that the logs have rotted by reason of the plaintiff relying on defendant's agreement to pay for them.

As to the first cause of action, the contract not being in writing and being denied by the defendant, the plaintiff is entitled to recover the injury to the land from the trees cut down and removed, *Archibald v. Davis*, 49 N. C., 138, or the value of the logs cut and removed as he may elect, unless he agreed to accept $6 per thousand in full payment, as alleged by the defendant. The plaintiff claims that he accepted $6 per thousand not in full settlement, but only upon condition that the defendant should cut and pay for all the timber, and that this not being done he is entitled to recover the actual damage. This raises an issue of fact to be passed upon by the jury. If this issue is found in favor of the plaintiff the recovery should be credited with the amount paid.

As to the second cause of action, it being admitted that the defendant cut sundry other logs and left them lying upon the ground, and the contract being denied because not in writing, the plaintiff is entitled to recover the injury to the value of the land from the trees being thus cut down and left on the ground by the defendant, *Archibald v. Davis, supra.* If the defendant had removed these logs the plaintiff would be entitled to recover the value of the same.

If it were incumbent on the plaintiff to sell the logs to minimize his loss he is entitled to show that he did not do so by reason of the agreement of the defendant, subsequent to cutting the logs, that he would remove and pay for them. By the act of the defendant in cutting the logs they became personalty, and the promise of the defendant to pay for them, if shown, would not be barred by the statute of frauds. *Green v. R. R.,* 73 N. C., 526; *Lumber Co. v. Brown,* 160 N. C., 283.

The judgment of nonsuit must to this extent be

Reversed.

MARTIN COUNTY v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 10 September, 1919.)

1. **Constitutional Law— Counties— Highways —Bridges —Bonds — Taxes— Statutes.**

   A legislative enactment, ch. 53, Public-Local Laws 1919, authorizing the issue of bonds by two adjoining counties to build a bridge and its approaches through a swamp in one of them, over a stream dividing them, specifying that the bonds shall not exceed the actual cost of said bridge and road, and apportioning the issuance three-fourths to the one and one-fourth to the other, is not in contravention of our State Constitution, though the bridge and its approaches specified in the act are within the county authorized only to issue bonds in the smaller amount. Rev., sec. 2695, amended by ch. 185, Laws 1919; ch. 312, Laws 1919.

2. **Counties— Highways— Bridges— Necessary Expense— Vote of People— Constitutional Law.**

   The Legislature may authorize adjoining counties to issue bonds in certain proportions for the building of a bridge across a dividing stream, and the validity of the bonds, being for a necessary county expense, does not depend upon their issuance being approved by the vote of the people.

3. **Counties— Highways— Bridges— Necessaries — Statutes — Constitutional Law.**

   Whether a county is benefited by the building of a bridge and approach over a stream between it and an adjoining county is a question for the Legislature to determine, and not reviewable by the courts.

4. **Counties— Highways— Bridges— Public Benefits— Taxation— Expense— Statutes—Constitutional Law.**

The construction and maintenance of roads and bridges are of public benefit, the expense of which the Legislature may cast upon the State at large or upon territory specially and immediately benefited, though the work may not be within a part of the total area attached.

5. **Counties—Highways—Bridges—"Approach"—Taxation—Bonds—Statutes —Constitutional Law.**

Where by legislative enactment adjoining counties are authorized to issue bonds to build a bridge over a dividing stream, apportioning the amount thereof each county may issue, and also for the "approach" to the bridge through the swamp lands in one of the counties, the "approach" provided for is to be considered and dealt with as a part of the bridge, in passing upon the constitutionality of the act.

6. **Constitutional Law—Counties—Statutes—Highways—Bridges— Taxation —Bonds—Local Acts.**

A public-local act authorizing two adjoining counties by joint action to build and construct a bridge over a dividing stream as already surveyed and laid out, with an approach thereto in one of the counties, and for the purpose to issue bonds in given proportions not to exceed the cost of the work, and to levy a tax to pay interest on the bonds and provide a sinking fund, is not such local, private or special legislation as is forbidden by constitutional amendment (sec. 29, Art. XI), the necessary part of the act being to authorize a special tax.

7. **Constitutional Law— Counties— Statutes— Taxation— Limitation —"Approval"—Sinking Fund.**

Chapter 103, Laws 1917, as amended by ch. 185, Laws 1919, and ch. 312, Laws 1919, relating to the issuance of bonds and the levy of taxes for county road and bridge purposes, as also ch. 53, Public-Local Laws 1919, as to Martin and Bertie counties, meet the constitutional requirement of "special approval of the General Assembly" required to levy a tax beyond the constitutional limitation; and a provision limiting the amount of the bonds to the "actual cost" of a bridge and its "approach" is not a prohibition against issuing the bonds before the work is done, for whatever sum that may remain over such cost may be invested in the sinking fund provided in the statute.

APPEAL by defendant from *Connor, J.*, at Chambers, 14 August, 1919; from MARTIN.

This is a controversy submitted without action upon facts agreed, and involves the validity of $150,000 bonds proposed to be issued by the county of Martin under authority of Public-Local Laws 1919, ch. 53, entitled "An act to authorize the boards of commissioners of Martin and Bertie counties to build a bridge over the Roanoke River at Williamston, N. C., and for other purposes."

The defendant put in the highest bid for this issue, $160,669.50 and accrued interest to date of delivery, which bid was accepted by the county of Martin, but the defendant now declines to accept and pay for said bonds upon the ground that the bonds are not legal and binding obligations of said county. The court upheld the validity of the bonds and adjudged that the county of Martin should execute and deliver the same to the defendant and that the defendant should pay said bid and costs of action. Appeal by defendant.

Dunning & Moore, H. W. Stubbs, John W. Hinsdale, Jr., Reed, McCook & Hoyt and W. Henry Hoyt for plaintiff.
Manly, Hendren & Womble for defendant.

CLARK, C. J. This is a controversy submitted upon an agreed case, without action, relating to a proposed issue of $150,000 of bonds of Martin County for the purpose of paying the county's share of the cost of building a bridge at Williamston over the Roanoke River, which divides Martin and Bertie counties, including the causeway or continuation of the bridge through the swamp on the Bertie side to the highlands.

It is provided that the entire work is to be constructed by the two counties jointly, at their joint expense, with Federal and State aid. The proposed road or approach on the Bertie side will run through swamps and other lowlands, and is necessary to the use of the bridge and practically a part of it. The bonds were awarded by Martin County to the appellant as the highest bidder on 30 June, 1919. The appellant is willing to comply with its bid, provided the county can lawfully issue these bonds and levy sufficient taxes to pay them. This proceeding was instituted in order to determine this question.

The defendant bank refuses to take and pay for said bonds upon the ground that they are not legal because "the act authorizing such bond issue violates the constitutional amendment, Art. II, sec. 29, which declares that the Legislature shall not pass any local, private, or special act relating to ferries or bridges; and for the further reason that the Legislature had no power under the Constitution to authorize Martin County to issue bonds to pay a part of the costs of building the road in Bertie County under the exclusive control of Bertie."

The court below adjudged that the bonds are valid obligations of the county; that the county is authorized to levy a sufficient tax to pay the principal and interest of the bonds without regard to the tax limit prescribed by the State Constitution, and that the proceeds of the sale of the bonds may be used by Martin County "in constructing the road approaching the bridge in the county of Bertie whether said road be wholly in the county of Bertie or partly in the county of Bertie and partly in the county of Martin."

The plaintiff relies upon three different statutes for authority to issue the bonds and to levy sufficient taxes to pay principal and interest thereof, i. e.:

1. Chapter 53, Public-Local Laws 1919, entitled "An act to authorize the board of commissioners of Martin and Bertie counties to build a bridge over the Roanoke River at Williamston and for other purposes."

2. Chapter 103, Laws 1917, amending Rev., 2696, as amended by ch. 185, Laws 1919, which is now secs. 137-143, ch. 69, Cons. Stat.

3. Chapter 312, Laws 1919, entitled "An act to enable all counties to provide funds to pay the cost of constructing or improving roads with Federal aid, and to pay the cost of maintaining such roads."

Under each of these three acts Martin County is authorized to issue bonds for road and bridge purposes and to levy sufficient taxes to pay such bonds.

The first act is applicable only to Martin and Bertie counties and specifically authorizes them "by joint action and agreement to build and construct a bridge over the Roanoke River at Williamston, as the same has already been surveyed and laid out, and to build and construct the road leading from the bridge on the Bertie side to the highlands of Bertie County"; authorizes each county to issue bonds for this purpose, the total amount not to exceed "the actual cost of said bridge and road," the Martin County bonds not to exceed $150,000 and the Bertie County bonds not to exceed $50,000, and further authorizes each county to levy a "sufficient tax to pay the bonds issued by it."

The second act provides in substance that "any county in the State" may build a public road or a bridge in the county, and any two counties may jointly build a highway bridge over a stream which divides them, and may apportion the cost between themselves in such proportion as they may agree upon; but the cost must not exceed 2 per cent of the assessed valuation of the taxable property in the two counties. County bonds may be issued for such roads or bridges in an amount not exceeding "the actual cost" thereof; and a "sufficient" county tax may be levied to pay the bonds.

The third act provides that any county may issue its bonds to pay its share of the cost of constructing or improving public roads in the county with Federal or State aid or both, and may levy a "sufficient" tax to pay such bonds; and that the term "road" as used in the act includes bridges and culverts in all cases where they constitute a part of the road which is to be so constructed or improved. The act provides, however, that certain portions of it shall not be enforced in 31 counties named therein (which do not include Martin) unless it is adopted by the voters at an election.

Pursuant to the first act, which for convenience may be called the "Special Act," Martin and Bertie counties having previously taken appropriate action for building at their joint expense the bridge and road prescribed in that act, Martin County now proposes to issue the $150,000 of bonds in question to pay its share of the cost. It appears upon the face of the special act that the road or approach referred to therein is to be almost wholly in Bertie.

It may be noted here that the bridge proper across the river is in Bertie for the boundary of Martin County is the low-water mark on the south side of the river. This appears from ch. 4, Laws 1729; 25 St. Records, 212; 2 Rev. Stat., 164, which boundary is recognized by the subsequent acts creating Edgecombe County out of Tyrrell, Laws 1741, ch. 7; 23 St. Records, 164; 2 Rev. Stat., 124; the act creating Halifax county out of the territory of Edgecombe, Laws 1758, ch. 13; 23 St. Records, 496; 2 Rev. Stat., 133; and finally, the act creating Martin County out of Halifax and Tyrrell, Laws 1774, ch. 32; 25 St. Records, 976; 2 Rev. Stat., 145. Indeed, it has been the usual procedure by the act establishing new counties that where a river or other stream is the dividing line said river has remained within the limits of the county from which the new county has been taken. But counties are merely instrumentalities and agencies of the State government. It has been enacted that when a crime has been committed on a boundary, a watercourse which lies wholly in another county, either county has jurisdiction of the offense (Rev., 234), and that a grand jury may be authorized to indict for offenses committed in another county (*S. v. Lewis,* 142 N. C., 626); and that as to civil matters not only the Legislature can change the boundaries at will with or without provision that the annexing county shall pay a part of the debt of the county from which the territory was taken (*Mills v. Williams,* 33 N. C., 558; *Comrs. v. Comrs.,* 95 N. C., 189; *Comrs. v. Comrs.,* 79 N. C., 565; *Watson v. Comrs.,* 82 N. C., 17); but the establishment of the boundary being a political question the Legislature, even after taxes are assessed, can decide where the boundary is (even though erroneously in fact) and direct to which county the tax from the disputed territory shall be paid. *R. R. v. Washington,* 154 N. C., 333.

The act of the Legislature here has authorized Martin County to issue $150,000 bonds as its just contribution to the entire cost of the bridge and its approaches from its beginning in Martin to the highlands in Bertie. The Legislature was doubtless moved to so enact by the representatives of that county in the General Assembly. As the bridge itself and the long approach through the swamp are in Bertie County almost the entire expense but for the apportionment authorized in the act by agreement of the commissioners would have fallen upon Bertie, though doubtless the greatest proportion of the benefit would have accrued to the county of Martin. The bridge, therefore, would not have been constructed but for the apportionment in the act which has been approved by the county commissioners of the two counties, and which was doubtless made in consequence of their agreement before the act was passed. The act, however, is merely permissive as to the amount of bonds each county can issue, and not mandatory.

It was entirely within the power of the Legislature to have built the bridge solely at the cost of the whole State, as in the numerous cases of State bonds issued to build railroads, though no part of the bridge and its approaches would have been upon the soil of the other 98 counties contributing to its erection. The act of the Legislature authorizing the two counties in the vicinity and apportioning the contribution of Martin County at not more than $150,000, and of Bertie at not more than $50,000, was not forbidden by any provision of the State Constitution. Being a necessary expense, these counties under the authority of the Legislature, can issue the bonds without a vote of the people. *Herring v. Dixon,* 122 N. C., 424, and cases cited thereto in the Anno. Ed.

Revisal, 1318, subsec. 29, provides: "When a bridge is necessary over a stream which divides one county from another the board of commissioners of each county shall join in constructing or repairing such bridge and the charge thereof shall be defrayed by the counties concerned in proportion to the number of taxable polls of each." In *Bridge Co. v. Comrs.,* 151 N. C., 216, it was held that this provision would apply irrespective of whether the division line between counties ran up the middle of the stream or whether the stream lay, as is not unusual (and as in this instance), entirely in one of the counties. In *McPeeters v. Blankenship,* 123 N. C., 651, where the boundary ran up the middle of the stream between Yancey and Mitchell counties, it was held that the commissioners of Yancey could not build the bridge without the joinder of the commissioners of the other county but "should have applied to the Legislature for an act authorizing the county of Yancey to construct the bridge at its sole expense." It therefore appears that the Legislature might have authorized the county of Martin to build this bridge entirely at its own expense. Certainly, if the Legislature could direct, as it does under Rev., 1318, subsec. 29, that the expense should be divided between the counties concerned "in proportion to the number of taxable polls of each," it has the power to provide for any other method of apportioning the expense. In this case, ch. 103, Laws 1917, amended by ch. 185, Laws 1919, has provided that "any two counties may jointly build a highway bridge over a stream which divides them and may apportion the cost between them in such proportion as they may agree upon." Chapter 53, Public-Local Laws 1919, apportioning $150,000 to Martin was evidently proposed in consequence of such agreement.

It has never been questioned that the construction of a bridge over a stream dividing two counties is a necessary and public purpose for which each county may constitutionally raise money. *Bridge Co. v. Comrs.,* 151 N. C., 215; *Mills v. Comrs.,* 175 N. C., 215. There is ample authority also in other jurisdictions that "It is not necessary that any part of a highway or bridge be within the territorial limits of the political subdivision on which the burden of its construction is imposed by the Legislature, provided such political subdivision is benefited thereby." *S. v. Williams,* 68 Conn., 131; 48 L. R. A., 465, affirmed 170 U. S., 304; 13 Ruling Case Law, title "Highways," sec. 13; 4 Ruling Case Law, title "Bridges," sec. 10, and it is for the Legislature and not for the courts to determine what property is benefited under such circumstances, unless the legislative action is palpably arbitrary and a plain abuse. *Houck v. Drainage District,* 209 U. S., 245; *Byram v. Marion County,* 145 Ind., 240. To the same purport *Taylor v. Comrs.,* 55 N. C., 141; *Holton v. Mecklenburg,* 93 N. C., 430; *Wood v. Oxford,* 97 N. C., 227; *Elizabeth City v. Comrs.,* 146 N. C., 539; *S. v. Williams, supra; Mobile v. Kimball,* 102 U. S., 691; *Kelly v. Pittsburg,* 104 U. S., 78; *Thomas v. Gay,* 169 U. S., 265; *Transit Co. v. Kentucky,* 199 U. S., 202-204; *S. v. Marion County,* 170 Ind., 595; *Duval County v. Jacksonville,* 36 Fla., 196; *S. c.,* 29 L. R. A., 416; *S. v. Atkin,* 64 Kansas, 174, affirmed 191 U. S., 207; *S. v. Edmundson,* 89 Ohio State, 92; *Thurston v. Caldwell,* 40 Okla., 206.

The rule to be deduced from these authorities may be thus summed up: The construction and maintenance of roads and bridges is a matter of general public concern. The whole body of the people of this State is benefited by them. The Legislature may cast the expense of such public works upon the State at large, or upon territory specially and immediately benefited, even though the work may not be within a part of the total area attached.

The decisions in *Comrs. v. State Treasurer,* 174 N. C., 141, and *Comrs. v. Boring,* 175 N. C., 105, may be distinguished from this case in that Martin County is not issuing bonds in behalf of any other political subdivision, and the road and bridge in question is an essential part or adjunct of the bridge which begins in Martin County. The proportionate part of the costs, i. e., three-fourths, is a fair estimate doubtless of the proportional part of the benefit which will accrue to that county from the construction of the bridge, including the causeway through the swamp on the Bertie side (which is an indispensable part of the bridge), having been enacted at the instance of the representatives of Martin County in the General Assembly and approved by the commissioners of that county. The road on the Bertie side is an "approach" to the bridge, and indeed is essentially a part of the bridge, for at places there are large arches as an outlet for the overflows of the river, which are not infrequent. These approaches are in law, as well as in fact, a part of the bridge. *Brown County v. Keya Paha County,* 88 Neb., 117; 4 Ruling Case Law, title "Bridges," sec. 2.

Besides, the apportionment in the act is merely permissive as to the amount of bonds each county may issue, and being within the powers of the General Assembly is not reviewable by us.

We have discussed this proposition first for it seems to be the real defense set up in this case. As to the other exception, that the special act, Public-Local Laws 1919, ch. 53, is within the constitutional prohibition of local, private or special legislation and forbidden by the Constitutional Amendment, sec. 29, Art. II, that matter has been fully discussed and conclusively settled by *Brown v. Comrs.,* 173 N. C., 598; and *Mills v. Comrs.,* 175 N. C., 215.

That amendment provides: "The General Assembly shall not pass any local, private, or special act of legislation . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets or alleys, relating to ferries or bridges. . . . Any local, private or special act or resolution passed in violation of the provisions of this act shall be void."

Chapter 53, Public-Local Laws 1919, provides that the board of commissioners of Martin and Bertie are authorized by joint action to build and construct a bridge over the Roanoke River at Williamston as the same has already been surveyed and laid out, and to build and construct a road leading from the bridge on the Bertie side to the highlands of Bertie County, and that to raise funds for that purpose the commissioners of Martin are authorized to issue bonds not to exceed $150,000, and the commissioners of Bertie not to exceed $50,000, with provisions as to issuing the bonds and levying taxes to pay the interest and to provide a sinking fund for the payment of bonds at maturity. The only necessary part of this act is the legislation authorizing a special tax. Even if the primary purpose of the act was not to authorize the bonds and tax and if the provision authorizing the building of the bridge was unconstitutional the latter is mere surplusage, and the bond and tax provisions would be valid and the work could be done under the implied power and under the general statutes above set out.

In *Brown v. Comrs., supra,* ch. 456, Public-Local Laws 1917, "authorized and directed" the board of commissioners of a county named in the act to issue bonds "for road purposes" in a certain township named therein, and provided for a sufficient annual tax in the township to pay the principal and interest of the bonds. The court held that this act was primarily a statute to provide for raising revenue for road purposes, and therefore was not within the constitutional prohibition. *Brown, J.,* said: "An analysis of the act shows that its primary purpose is to authorize the sale of bonds for road purposes in North Cove Township and to require the levying of a tax to pay the interest and principal of the bonds. . . . It only provides the *means* for constructing and repairing them. . . . Speaking of such legislation as affected by a constitutional provision the Pennsylvania Court, *In re Sugar Notch Borough,* 192 Penn. St., 349, says: 'The restrictions of the Constitution apply to direct legislation, not to the incidental operation of statutes, constitutional in themselves, upon other subjects than with those with which they directly deal.' So in this case, the bond issue being the direct legislation, the fact that it provides that the proceeds of the bonds are to be used for road purposes will not bring it within the prohibition of the constitutional amendment."

In support of this proposition the court referred (page 600) to the absolute necessity of special legislation authorizing county and township bond issues and taxes for roads. The object of the amendment was not to inhibit the Legislature from granting such permission in cases where, under our Constitution, legislative permission is necessary, but it was intended to prevent taking up the time of the General Assembly and filling up the volumes of statutes in authorizing the laying out of highways and other local matters which the county commissioners were fully authorized and empowered to act upon without legislative permission.

In *Mills v. Comrs., supra,* ch. 575, Public-Local Laws 1917, was held not to be in conflict with above-cited amendment to the Constitution, sec. 29, Art. II. The act there considered authorized the people of the county named in the act to issue bonds "for the purpose of building bridges across the Catawba River" jointly with another county named, and to levy a special tax to pay the bonds. *Hoke, J.,* placed the decision upon the ground above stated in *Brown v. Comrs.* He said: "It is well understood that our General Assembly at session after session was called on by direct legislation to authorize a particular highway or street or to establish a bridge or ferry at some specified place. . . . The Legislature in these cases was in fact called on to usurp, or rather to exercise, functions which were more usually and properly performed by the local authorities, and it was in reference to local and special and private measures of this character that these amendments were adopted, and, as stated in *Brown's case, supra,* it was never intended to prohibit legislation authorizing the raising of proper funds by the sale of bonds or by taxation required for the public good, though such funds should be for improvements in some fixed place or in restricted territory determined upon by local authorities in pursuance of general laws on the subject."

This is a clear conception and statement of the purpose and the applicability of sec. 29, Art. II, of the Constitution. We could not add to it or make any change therein without making it less clear. It cannot be improved upon. The Brown and Mills cases were, we think, rightly decided, and are reaffirmed. They have been cited with approval in *Parvin v. Comrs.,* 177 N. C., 510.

The same view is taken in *Morrill v. Supervisors,* 112 N. Y., 585, and *Bridge Co. v. Attica,* 119 N. Y., 204. In *Robertson v. Board of Supervisors,* 112 Miss., 54, the Court held that an act providing for the issuance of bonds to pay for the improvement of public roads did not violate a section of the Constitution of that State almost identical with sec. 29, Art. II, of our Constitution, for the reason that it did "not provide for the laying out, opening, altering and working roads and highways, but for the raising of revenue with which to pay for the working of roads and highways, the method by which they have been or are to be laid out, opened, altered and worked, being governed by the general laws relating thereto." The same principle was enunciated in *In Re Sugar Notch Borough,* 192 Penn. St., 349, already quoted in the citation from the opinion in *Brown v. Comrs., supra.*

More than 150 statutes, authorizing issue of bonds for constructing roads or bridges in certain counties, townships or road districts therein named were passed at the last session in reliance upon the Brown and Mills cases. Under the authority of these statutes many hundreds of thousands of bonds have been issued or are about to be issued, and contracts have been let or are about to be let for the construction of roads and bridges in all parts of the State. It is of the highest importance therefore that the authority of those cases shall be sustained.

The primary purpose of the special Martin County act above was to authorize the bonds and the levy of a tax to pay the principal and interest thereof. Under their power to undertake public improvements involving a necessary expense Martin and Bertie could have built the bridge and approaches and road thereto without any act of the Legislature, and could have issued bonds for that purpose and by agreement apportioned the total cost between them. The only really necessary legislation was to authorize a special tax to pay the bonds. *Comrs. v. McDonald,* 148 N. C., 125.

Lastly, it is contended in the defendant's brief that in *R. R. v. Cherokee,* 177 N. C., 65, the Court held that a general act giving every county or certain named counties optional authority to levy special taxes was unconstitutional and that a "special act" was necessary, but that a contrary decision was made in *Parvin v. Comrs., ib.,* 508. The Court in the *Cherokee case* divided, the dissenting opinion expressing the view that the legislative authority to levy a special tax under Constitution, Art.

V, sec. 6, did not require a "special act" for that purpose, but only the "special approval" which could be given as well by a general act empowering any or all counties to do so. *Parvin v. Comrs.* did not, as the defendant contends in his brief, expressly overrule the *Cherokee case*, but distinguished it by pointing out that it was based on a statute enacted in 1913, prior to the Constitutional Amendment. In the *Parvin case* the Court held that a general statute passed since the amendment, i. e., ch. 284, Laws 1917, providing that the "county commissioners of any county, for the purpose of laying out, opening, etc., the public roads and bridges of any county, may order an election to take the sense of the qualified voters of the county upon the question of issuing bonds for that purpose," was sufficient. This is the latest utterance of the court.

The Constitution, Art. V, sec. 6, requires the "special approval" of the Legislature to exceed the limitation of taxation for even necessary purposes. If the *Cherokee case* were construed to prohibit this approval being given by a general act, and Constitution, Art. II, sec. 29, prohibits a special act, this would prevent such approval being given in any case.

We think, therefore, that the special act (ch. 53, Public-Local Laws 1919) relied upon as authority for the bonds does not conflict with the Constitutional Amendment, Art. II, sec. 29, which prohibits local, private or special legislation in certain cases. We are also of opinion that the two general acts (ch. 103, Laws 1917, as amended by ch. 185, Laws 1919, and ch. 312, Laws 1919) referred to in the beginning of this opinion also satisfy the constitutional requirement of "special approval of the General Assembly" authorizing the levy of a tax beyond the constitutional limitation.

The provision limiting the amount of the bond issue to the "actual cost" of the bridge or road is not a prohibition against issuing bonds before the work is done. The amount of bond issue may be based upon the estimate of the cost made either before or after the work is done. Any other construction of the statutes might make it impossible for the county to proceed with the work, for contractors usually insist that the financial arrangements be made before the work is begun. Should it happen that the work can be let at a less total cost than the amount received from the bond issue, the surplus can be invested in the sinking fund required to pay off the bonds at maturity.

The Roanoke River, as is well known, is the only one in the entire Union of its length between the falls and its mouth, and of no greater width, that is, not spanned by any bridge at all. In this State there are numerous public bridges across the French Broad, the Catawba, the Yadkin, the Cape Fear, the Neuse and the Tar rivers where they are wider than the Roanoke. Particularly is this so as to the bridges across the Neuse at New Bern and the Pamlico at Washington, and the railroad bridge across Albemarle Sound is $5\frac{1}{2}$ miles long. It is patent that the construction of this bridge, and indeed of bridges at divers other points over the Roanoke, is a public necessity not only for the people of the fertile country on each side of that stream, but will be to the great benefit of the entire State.

After the fullest consideration of all the arguments adduced the judgment below is

Affirmed.

ROANOKE RAILROAD AND LUMBER COMPANY v. J. B. PRIVETTE.

(Filed 10 September, 1919.)

1. **Options—Timber Contracts—Specific Performance—Evidence—Instructions—Questions for Jury—Trials.**

   In an action to enforce specific performance of an option to cut timber the evidence was conflicting as to whether the period of ten days for acceptance was extended to fifteen days. The evidence tended to show that a check for the amount was tendered the defendant within fifteen days, but after the lapse of ten days: *Held*, an instruction was erroneous, as invading the province of the jury, to find for the plaintiff if the jury found the facts to be as testified.

2. **Legal Tender—Waiver—Burden of Proof.**

   A check is not a legal tender of the contract price, and will not have the effect of such, unless such tender is waived by the other party, with the burden of proof on the party claiming it.

APPEAL by defendant from *Bond, J.*, at February Term, 1919, of NASH.

This is an action for specific performance of an option in favor of the plaintiff to cut timber. Verdict and judgment for the plaintiff. Appeal by the defendant.

Austin & Davenport, Bunn & Spruill, Small, MacLean, Bragaw & Rodman for plaintiff.

Finch & Vaughan, W. H. Yarborough, J. S. Manning and J. Crawford Biggs for defendant.

CLARK, C. J. There are several assignments of error, but the defendant's brief presents but one, and that is sufficient for the disposition of this appeal. The plaintiff sued for specific performance of an option dated 14 March, 1917, alleging that within the time prescribed it offered to comply with the terms of the option and that it was ready, able and willing to do so. This was denied by the defendant.

The evidence is that it was verbally agreed that the plaintiff was to have an option for ten days and that plaintiff's agent, G. D. Taylor, prepared the option and then read it to the defendant as if it was written for ten days, but as a matter of fact he left the time blank, and after the option was signed and delivered he testified the defendant agreed to extend the time to fifteen days. This is denied by the defendant. It is admitted by the plaintiff that the draftsman Taylor, its agent, did not insert the fifteen days in the option at the time, and it is not clear when it was done, but there is evidence that it was not till after this controversy arose. There was also evidence that Taylor read the option differently from what he had written in other respects. There was evidence on the part of the plaintiff that on 24 March, 1917, within the ten days, the plaintiff was able, ready and willing to pay the money, and that it so notified the defendant. This is contradicted by evidence for the defendant.

There is also evidence on the part of the plaintiff tending to prove that on 24 March the plaintiff had not decided to take the land, for the plaintiff's witness, Rodman, testified that he went to Nash on 24 March to investigate the title, and plaintiff's witness, Taylor, who was its agent on the ground to secure options and who prepared this option, wrote under date of 26 March to plaintiff's attorney, Rodman, just after the latter's trip of 24 March to Nash County, as follows: "Dear Sir: Enclosed find plat of J. B. Privette's land from which you can get proper description of the timber which we propose to buy from him *provided, however, the company agrees to take it up. If they have agreed to make this purchase,* please let me have the deed as early as possible as Mr. Privette appears to be impatient and dissatisfied."

Rodman testified that he went from Nash to Norfolk and had a conference on 26 March with the company and then went home to prepare the deed, and it was forwarded to Taylor who presented it to the defendant for his signature with check for $17,500 on 29 March, but the defendant refused to accept the check or execute the deed because the time limit of ten days had then expired.

The court charged the jury that "The second issue is, Was the plaintiff company at all times ready, able, and willing to comply with its part of the agreement as alleged in the complaint," and further told them, "As to second issue, I say if you believe the evidence in the case and find the facts to be as it tends to prove, your answer to the second issue ought to be 'Yes.'"

Plaintiff contends that there was a verbal extension of the option to fifteen days, but this is denied by the defendant in his testimony, and the charge of the court was equivalent to telling the jury that the evidence was uncontradicted that the plaintiff was ready and willing to perform within the ten days, yet the defendant testified that no tender or offer was made by that date, and Mr. Rodman was not sent there to make the examination of title till that date, and he did not make his report to the company till 26 March.

Taylor's letter of 26 March is evidence that at that time he had received no instructions from the company to close the deal, and so far as he knew the company had not then decided to take the property. Under the evidence it was for the jury to say whether the company was ready and willing on 24 March to take the title. The charge of the court was tantamount to telling the jury that the extension to fifteen days had been agreed upon though this was controverted. This was an invasion of the province of the jury.

It must be noted that the check was not a legal tender unless there had been evidence that the defendant was willing to accept a check in lieu of $17,500 in legal tender money. The burden was on the plaintiff to prove a waiver.

Error.

V. D. GUIRE v. BOARD OF COMMISSIONERS OF CALDWELL COUNTY.

(Filed 10 September, 1919.)

1. **Constitutional Law—Statutes—Amendments—Counties—Municipal Corporations—Bonds.**

   Where a proposed issue of bonds by a municipality has been favorably voted upon under the provisions of a constitutional statute, restricting the rate of interest, but the rate of interest allowed has been increased by a later and unconstitutional amendment, and the election has been held with reference to the increased rate, the increased rate over that authorized by the valid statute may be disregarded and the proper municipal authorities may issue valid bonds at the rate of interest authorized in the prior statute, in accordance with its terms.

2. **Constitutional Law—Municipal Corporations—Bonds—Sales—Adjourned Meetings—Statutes.**

   Where the municipal authorities have advertised the sale of bonds to be issued according to the terms of a valid statute, and cannot finish the transaction and consummate the sale on the day designated in the advertisement, they may adjourn over to some other day in the near future for the purpose of completing the matter, especially when they have given due notice of the second meeting, the object of the law being to prevent clandestine sales of bonds of this character.

ACTION tried before *Harding, J.*, at August Term, 1919, of CALDWELL.

This case was before this Court at the last term, and our decision therein is reported in 177 N. C., at p. 516, where the facts are stated, so far as pertinent to that appeal. We there held that the act of 1919 increasing the rate of interest, as fixed by the Public-Local Laws of 1917, ch. 67, from 5 per cent to a rate not exceeding 6 per cent was invalid, not having been passed in accordance with the Constitution, Art. II, sec. 14. Since that case was decided the board of commissioners of the county has properly advertised the meeting for the sale of the bonds, and the meeting was held accordingly, at which the commissioners received and accepted a bid for the bonds at a 5 per cent interest rate. The plaintiff sought and obtained a restraining order, and at the hearing of the application for an injunction the court, by consent of the parties, found the facts, and concluded therefrom that the bonds proposed to be sold to the successful bidder will be valid obligations of the county. The court held the bonds to be valid and so adjudged, but enjoined any issue of bonds bearing more than 5 per cent interest. Plaintiff appealed.

J. T. Pritchett for plaintiff.
Mark Squires for defendant.

WALKER, J., after stating the case: We will now consider the case with reference to the objections of the plaintiff and their validity, as they are presented in the record and in the findings and judgment of the court:

1. The Public-Local Laws of 1917, ch. 67, provided for a second election if, at the first one, there was an adverse vote by the people. There is no dispute as to the regularity of the election except in one respect, which will presently be noticed. There were two elections held. At the first of these, held in 1917, the result was against a bond issue, and at the second the vote was in favor of issuing the bonds at a rate of interest not exceeding 6 per cent. Both elections were held under chapter 67 of the Public-Local Laws of 1917, as appears by the record; the second, though, was held after the passage of the amendatory act of 1919. That act amended the act of 1917 only in one respect, viz: by striking out "five per cent" and inserting in lieu thereof the words "not exceeding six per cent," and for that reason the call for the election specified the rate, which was not to exceed 6 per cent, but the election was held and conducted under the act of 1917, the other act making no provision for an election but simply changing the rate of interest. The latter act being wholly void, it could not have the effect of repealing or amending the act of 1917, which remained in full force, notwith-

standing the same. There was no intention, expressed or implied, to repeal the old law, but the only purpose was to amend it, and this purpose failed altogether by reason of the invalidity of the later act. This principle is well settled by the authorities. 36 Cyc., 1098, and the numerous cases in the notes which sustain the text. *Waters-Pierce Oil Co. v. State of Texas*, 177 U. S., 28 (44 L. Ed., 657); *City of Lexington v. Bank*, 165 Mo., 671; *Wilkinson v. Board, etc., of Marion Co.*, 158 Ind., 1; *Barker v. Potter*, 55 Neb., 25; *Russell v. Ayer*, 120 N. C., 180. Many other cases are cited in the defendant's brief to the same effect. The people having voted for the issue of bonds at a rate not exceeding 6 per cent, it was equivalent to a vote for bonds at any less rate, as the greater includes the less, and therefore they have approved an issue of bonds at 5 per cent. The submission of the question was irregular, it is true, but not sufficiently so to invalidate the result, when the court has perpetually enjoined any issue above the proper rate, as was done in this case. This is amply protective of the interests of the taxpayers. It was held in *City of Quincy v. Warfield*, 25 Ill., 317, 321, that where bonds were issued bearing interest at 12 per cent, whereas no more than 8 per cent interest was allowed in the statute by which they were authorized, the bonds were good at the rate of 8 per cent, or *pro tanto*, and that all in excess of that rate must be rejected. The Court said: "It is contended that the bond is void because it stipulates for a greater rate of interest than 8 per cent per annum. In the case of *Johnson v. Stark County*, 24 Ill., 75, we recognized the doctrine that in exercising a power all acts performed in excess of or beyond the power delegated must be rejected as unwarranted; but if, after the rejection of such acts, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts performed beyond the power delegated. In other words, so much of the act done as is within the power granted shall be upheld, whilst all beyond the power shall be rejected as an excess of power. Upon the ruling in this case we must decide, and do decide, that the bond is valid and binding on the city, with interest, to be calculated at 8 per cent per annum. It is not vitiated by the excess, but only *pro tanto*, and the court trying the case should have made the deduction and given judgment for the bond, with interest at 8 per cent per annum, the city having no power to stipulate for interest beyond that rate." And likewise it was held in *Parkinson v. City of Parker*, 85 Pa. St., 313, that "The right of a borough to borrow money within the prescribed limits and issue certificates therefor, bearing interest, is conferred by the borough law of the State, and the fact that the bond in this case called for 8 per cent interest did not invalidate it, and it was only void for the excess over the legal rate of interest."

2. The proposed issue of bonds is not invalid upon the ground, alleged by the plaintiff, that the commissioners of the county have not provided for three series of bonds payable at three different dates. That arrangement, as authorized by the act of 1917, was merely permissive or discretionary with the board, and was manifestly intended to be so, as otherwise the provisions of the act would be conflicting. It empowers the commissioners, in the exercise of their discretion, to fix the maturity of the bonds, so that they will be payable at such time or times not exceeding forty years from the date thereof, and at such place or places as the board may determine, and also conferred upon them the power to prescribe the form and tenor of the bonds. This general authority was broadly given, upon the theory that a restricted one might militate against an advantageous sale of the bonds. Public-Local Laws of 1917, ch. 67, sec. 1.

3. The meeting at which bids were to be received and accepted was properly advertised according to Public Laws of 1917, chs. 147 and 174. The notice as to the first meeting was a strict compliance with those statutes, and as the board could not finish the transaction and consummate the sale at that meeting, it was competent for them to adjourn over to another day in the near future, as they did, and complete the business. This very question was decided in *McChesney v. City of Chicago*, 201 Ill., 344, where it was held that such an adjournment was clearly legal, as the interested parties must take notice of the same when the first meeting has been properly advertised. But in our case the board did give special notice of the second meeting. The object of this provision of the law was to prevent secret or clandestine sales of municipal and other bonds of public corporations, and this purpose was fully accomplished in the present instance.

4. This contention is substantially the same as the first one. The particular form of the objection here is that the call for the election and the notice of the same was confined to the issuing of bonds at a rate not exceeding 6 per cent, but the form of the objection is immaterial, as we are concerned more with its substance. It involves the same principle we applied to the first contention and upon which we decided it. If the people voted for bonds at a rate not exceeding 6 per cent, they were intelligent enough to know that it meant a 6 per cent rate or any rate below it, which of course included a 5 per cent rate. Suppose the act of 1919 had not been passed, then they could have voted only for a rate not exceeding 5 per cent under the act of 1917, as it provides for such a rate, that is, a maximum rate of 5 per cent. If the result had been favorable to the issuing of the bonds, can it be doubted that the commissioners could have validly issued them at any rate below 5 per cent? The object of fixing a maximum rate of interest was to enable the com-

missioners to get a lower rate than 5 per cent, if they could do so, and there was no other reason for it. One of the familiar maxims of the law is *Utile per inutile non vitiatur,* which means that surplusage does not vitiate that which, in other respects, is good and valid; and there is another, *Surplusagium non nocet,* or that surplusage is innocuous and must be disregarded. Broom's Legal Maxims (6 Am. Ed.), p. 462, marg. p. 603. Where an award recited that the three arbitrators had concurred in it, whereas one had not, but had dissented, it was held (*White v. Sharp,* 12 M. & W., 712), applying the maxim that the award was good, as the recital, so far as it stated the higher number of concurring arbitrators, was immaterial and useless, as the two were sufficient. So here the 5 per cent was valid and sufficient to sustain the election, and the recital of the 6 per cent, or 1 per cent more, being surplusage and useless, does not vitiate that which is legal. The election was held under the act of 1917, by clear and specific reference to it in the call for it. There was no machinery provided in the act of 1919 for holding an election, and in this respect the former act was left intact. All of the objections of the plaintiff were properly overruled.

Affirmed.

IN RE DAISY BELL WARREN.

(Filed 10 September, 1919.)

1. Habeas Corpus—Parent and Child—Custody of Child.

The parents of an infant child have *prima facie* the right and preference of its custody and control against the claim of others; but this right is not universal and absolute and will yield when it is shown that the welfare and best interest of the child clearly requires it.

2. Same—Findings—Award—Strangers—Contracts.

The mother of an illegitimate child, eighteen months of age, entered into a written contract, under seal, with the respondent, conveying the right of control and natural guardianship of the infant until it became twenty-one years of age. The lower court found, upon sufficient evidence, that the petitioner had at that time no means for supporting the infant, was a prostitute, leading a wandering life, but since had married a respectable man, to whom she had borne a child, who worked and supported his family in good, religious and educational environment; that the respondent was a good man and loved and cared for the child, now five years of age, as a parent; was able to support it, had placed it in good, religious and educational environment, and, having no child of his own, was treating it as his own, with the intention of adopting it: *Held,* upon these findings, a judgment was a proper one, that the welfare and best interest of the child required that it remain for the present with the respondent, and so ordering. As to whether the conveyance was sufficient in itself, *quære?*

HABEAS CORPUS proceedings to determine the rightful custody of an infant child, heard before *Devin, J.*, at Chambers in February, 1919; from BEAUFORT.

There was judgment denying the petition, and petitioner appealed.

Ward & Grimes for petitioner.
Small, MacLean, Bragaw & Rodman for appellee.

HOKE, J. It appears that about six years ago the petitioner, then Mattie Perry, resident of Nash and Pitt counties, about fifteen years of age, gave birth to an illegitimate child, the subject of this controversy; that about eighteen months after this birth, finding it difficult, owing to reputation and conduct, to obtain any suitable abiding place, she executed a written instrument, under seal, conveying to respondents, C. E. Swain and wife, now resident in Beaufort County, the right of control and natural guardianship, conditioned upon good treatment, until said child became twenty-one years of age. That about six or seven months thereafter, the petitioner having removed to the city of Charlotte and procured employment, there intermarried with Mr. A. J. Kearns and has one child, now living, born of the marriage. At the hearing and on competent testimony the court finds the following facts as more directly relevant to the inquiry:

That the petitioner, Mrs. Mattie Kearns, was before her marriage known by the name of Mattie Perry; that she was a woman of disreputable character and gave birth to an illegitimate child, the said Daisy Perry; that when the child was about a year old that petitioner was then working in the cotton mill in Greenville, but her conduct there was bad and she was required to leave. Thereupon she went to this respondent, Mr. Charlie Swain, and gave him the custody of the said child until she should become twenty-one years of age, and executed in the presence of witnesses a paper-writing setting out the fact of her having so renounced the custody of her child in favor of the said Swain, copy of which said paper is hereto attached. Said Swain at that time had only known petitioner a short time and did not know her reputation or that the child was illegitimate. Petitioner then left and went to Smithfield, and from there to Charlotte. That at Charlotte she married her husband, A. J. Kearns, and seems to have since her marriage led a correct life, and there is no evidence of improper conduct upon her part since that time except her conduct in Washington last summer, when she was seen riding on the handlebars of a bicycle with one Robert Satterthwaite. That the husband of said petitioner is a man of good character, and they are living in Charlotte in a good neighborhood and members of the church, Mr. Kearns earning a living as clerk in a store, and petitioner has borne two other children.

That the respondents are now living in the county of Beaufort, about six miles from the town of Washington, in a good home in a neighborhood where the surroundings are favorable, close to church and school, and that the respondent Swain is a man of good character and well suited and qualified to nurture and rear the child.

That the respondents have no children, their only child having died in infancy some years ago. That they love the said Daisy Perry as their own child, and state that they propose to adopt the said child formally and give her their name. That they have had the custody of the said child for about four years, the child being now about five years of age, and the ties of affection between them and the said child have grown to be on both sides such as are usual between parent and child.

And the court finds that the best interests of the child would be served by permitting the child to remain in the custody of the respondents.

It is fully recognized in this State that parents have *prima facie* the right of custody and control of their infant children, the father preferably when both are equally worthy, and it is held also in several decisions dealing directly with the question that this parental right is not universal and absolute but may and will be made to yield when it is shown that the welfare and best interest of the child clearly requires it. *In re Means,* 176 N. C., 307; *Atkinson v. Downing,* 175 N. C., 244; this last case citing among other authorities *In re Mercer Fain,* 172 N. C., 790; *In re Alderman,* 157 N. C., 507; *In re Mary Jane Jones,* 153 N. C., 312; *In re Turner,* 151 N. C., 474; *In re Samuel Parker,* 144 N. C., 170; *Newsome v. Bunch,* 144 N. C., 15; *Latham v. Ellis,* 116 N. C., 30. In *Atkinson's case* the basic principle, with the suggested limitation upon it, is stated as follows:

"The *prima facie* right of parents to the care and custody of their infant is a natural and substantive one which will not be interfered with by the courts unless the good of the child clearly requires it.

"While this parental right is fully recognized in this State, it is further held that the welfare of the child is also entitled to full consideration, and on especial facts may become controlling in the disposition of its custody."

The court having found upon sufficient testimony that the best interest of the child requires that it remain for the present in the care and custody of the respondents, on the record and in accord with the principles stated, we approve both the finding and the judgment thereon and hold that the prayer of the petitioner has been properly denied.

It may be that, under the correct interpretation of our statutes on the subject, Rev., sec. 1762, conferring on a father, though a minor, the right of disposition of his infant and unmarried child by deed or will, etc., and section 1765, constituting the mother the natural guardian of her infant children, as between these parties, the strictly legal right of guardianship of this child rests with respondents under its mother's deed, but without definite ruling on that question we prefer to rest our decision on the facts found by his Honor, that the welfare and best interest of the child requires that it remain, for the present, where the deed of the mother has placed it and where, according to the evidence and findings, in a comfortable home, it has a safe and sheltered life.

We find no error, and the judgment of the court below is

Affirmed.

J. W. RICHARDSON AND NEW BERN PRODUCE EXCHANGE COMPANY, INC., v. S. D. WOODRUFF & SONS.

(Filed 17 September, 1919.)

1. **Vendor and Purchaser—Contracts—Delivery—Intent.**

   The physical delivery of specific goods contracted for is not required to pass the title to the purchaser, if the intent of the parties otherwise appears from the wording of the instrument.

2. **Same—"Order, Notify"—Title—Attachment.**

   Irish potatoes were bought to be placed in cold storage by the seller for future shipment from a distant point by common carrier, and were accordingly shipped "order, notify consignee": *Held*, the contract was executory until the goods were received and accepted by the consignee, giving him reasonable time for inspection before accepting it, to ascertain if they were of the kind or quality he had purchased; and to that time the title remained in the seller, and the goods having been rightfully refused were subject to attachment by the purchaser for moneys he had advanced upon the purchase price.

3. **Contracts—Ambiguity—Shrinkage—Potatoes—Parol Evidence.**

   Where Irish potatoes are purchased to be placed in cold storage before shipment by the seller, and, after shipment, they are received from the carrier in a soft condition and sprouting, and the evidence is conflicting as to the meaning of a provision in the contract of purchase "that shrinkage be stood by the purchaser," the terms used are sufficiently ambiguous to be explained by parol, and their meaning is for the jury to determine.

4. **Attachment—Affidavits—Motions—Actions—Appearance of Defendant—Jurisdiction—Pleadings—Issues.**

   Where attachment has been sued out as an ancillary process in an action, and the purchaser of the goods has accordingly levied upon them, in order to recover moneys he has paid, in advance, upon the purchase price, the general appearance and answer of the defendant renders the question as to the attachable interest of the plaintiff no longer jurisdictional, this not being raised in the pleadings and not being an issuable question as a matter of right; and objections of law or fact to the sufficiency of the affidavit, or in general to the validity of the attachment as ancillary to the principal demand, should be raised and presented by motion in the cause or, in some instances, by special objection to the form or amount of the judgment.

5. **Evidence — Opinions — Facts—Experience and Observation—Potatoes—Cold Storage.**

Where the seller has contracted to place Irish potatoes in cold storage for future shipment, under a contract executory until accepted by the purchaser, and upon the latter's receipt thereof they are found to be in bad condition, a witness who, of his own knowledge, is aware of such condition at delivery, and is qualified to know from his own experience and observation in the handling of Irish potatoes the effect of cold storage upon them, etc., is qualified to testify, in his opinion, as to the condition of the potatoes when taken from cold storage for shipment.

ACTION tried before *Devin, J.*, and a jury, at March Term, 1919, of PASQUOTANK.

The action is to recover damages for failure to deliver 100 barrels of seed potatoes, pursuant to a contract of defendant with plaintiff, J. W. Richardson, and in which coplaintiff had acquired an interest pending negotiations. The amount of $5 per barrel had been paid by plaintiff making order, on "deposit," to be applied towards the purchase money, pursuant to the terms of the agreement.

There was denial of liability by defendant and a counterclaim for balance of the purchase money alleged to be due defendants, claiming that the potatoes were in all respects up to contract specifications.

On the issue as to damages, the court restricted plaintiff to recovery at most of the $500 made on deposit, as stated.

As ancillary process in the cause, plaintiffs had sued out an attachment and caused same to be levied on the potatoes that were shipped and after plaintiffs had declined to receive same.

The jury rendered the following verdict:

1. Did the defendants contract to sell to the plaintiffs 100 barrels of Irish potatoes at the price of $12.50 f. o. b. New York, for shipment August the first, upon the terms set out in the correspondence offered in evidence? Answer: "Yes."

2. Did the defendants fail to comply with the terms of said contract? Answer: "Yes."

3. What damage, if any, are the plaintiffs entitled to recover therefor? Answer: "$500 and interest."

4. What amount, if any, are the defendants entitled to recover of plaintiffs by reason of their counterclaim set up in the answer? Answer: ....

There was judgment on the verdict for plaintiff and both sides appealed, assigning errors.

DEFENDANT'S APPEAL.

Meekins & McMullan for plaintiffs.
Robert J. Woodruff and George J. Spence for defendant.

HOKE, J. The facts in evidence tended to show that, in answer to a letter of plaintiff, doing business in Elizabeth City, N. C., of date 7 June, 1917, seeking to purchase a lot of "Peach Blow" "cold storage" seed potatoes, and making inquiry as to price of 100 bags and per carload, defendants, doing business in New York City, wrote in reply from that place on 8 June as follows: "We are in receipt of your letter of the 7th asking us to give you prices on some Peach Blow cold storage potatoes, but we have no Peach Blow, and we promptly wired you that we had 40 bags of Cobblers and 100 bags of Spaulding Rose No. 4. Spaulding Rose No. 4 is very similar to the Peach Blow. We quote you these at $12.50 per barrel f. o. b. New York, for shipment August 1. If you order, we shall expect deposit of $5 a barrel at once, the balance draft attached to bill of lading. Any shrink to be stood by you after they go into cold storage. Goods are sound and a No. 1 now in every matter. We await response to this matter.

Yours very truly,
S. D. WOODRUFF & SONS."

On 11 June plaintiff wrote from Elizabeth City, N. C., accepting offer 100 barrels Spaulding Rose at price of letter, and on 12 June sent a telegram to plaintiff, accepting offer, and on 20 June sent the $500 as required, etc. It was admitted that on 2 August Woodruff & Sons shipped from New York to their own order 86 barrels of Irish potatoes, bill of lading attached, order notify New Bern Produce Company, and same arrived at Elizabeth City on 8 August. There was testimony on part of plaintiff to the effect that the potatoes so shipped, on arrival at Elizabeth City, were utterly unfit for the purpose for which they were ordered, and were at the time they were put in cold storage and at the time same were shipped out of cold storage on 2 August. "That the barrels were about one-half to two-thirds full; that they were sprouting, with sprouts one-half to three inches long; they were soft, shriveled up, and a great many of them rotten." That plaintiff declined to accept the potatoes and thereupon instituted the action for damages, and had issued and levied an attachment on same as property of defendants.

Plaintiff's testimony further tended to show that the term, "Any shrink to be stood by the purchaser after they go into cold storage," as contained in letter of defendant proposing sale, signified only "that when the barrels are filled they will stretch and cause the potatoes to shrink," and had no reference to the condition of the potatoes except perhaps as to weight, but in other respects, potatoes, if up to specifications, should have continued sound to time of arrival in Elizabeth City, and that the market value of seed potatoes at said time of arrival was from $18 to $25 per barrel.

The testimony of defendants tended to show that the potatoes were sound and fully up to specifications when put in cold storage, 20 June, 1917; were properly cared for there, and were sound and all right when shipped; that the natural effect of taking potatoes out of cold storage, exposing same to the temperature then existent, from 2 August to 8, would cause them to shrink and make them soft, etc., etc.; that the term "shrinkage to be stood by you" covers both sprouting, rotting and softening, and "was put in there to protect the defendants," etc.

Upon this, the evidence chiefly relevant to the inquiry, it is insisted for the defendant that the facts showed an executed contract of sale at the time the potatoes were put in cold storage on 20 June, and any damage by reason of such storage or which thereafter followed must be properly borne by the purchaser, but we do not so interpret the agreement. It is undoubtedly true, as defendant contends, that present physical delivery of the goods is not always required to an executed contract of sale but that title will pass without it if that be the intent of the parties as expressed in the agreement. In the last case on the subject, *Teague v. Grocery Co.*, 175 N. C., 195-198, a proper application of the principle is given as follows:

"On the present record there are facts in evidence tending to show that this transaction was an executed contract of sale, having reference to designated and specific pieces of property, and if these facts should be accepted by the jury, it is well understood that present physical delivery of the property is not necessary to the transfer of the title but that the same passes according to the intent of the parties as expressed in the contract between them; and further, that in the absence of specific agreement on the question the presumption is that the title passed at the time of the purchase and without such delivery," citing *Richardson v. Ins. Co.,* 136 N. C., 314; *Jenkins v. Jarret,* 70 N. C., 255; Tiffany on Sales, pp. 82-83; Benjamin on Sales (7th Ed.), p. 728. But while such a position is fully recognized, in sale of specified articles, we concur in the view of his Honor that, by the terms of the agreement, this contract continued executory till the goods were shipped on 2 August, and beyond that, the same having been shipped to defendant's order, and the question of whether the goods were up to specifications was properly submitted to the jury in that aspect, leaving it to them to say what was the significance of the terms, "shrinkage to be stood by the purchaser," these terms being sufficiently ambiguous to permit of explanation by parol testimony. *McMahan v. R. R.,* 170 N. C., 456, and authorities cited. Nor on the record, as now constituted, can the objection be sustained or properly considered that no attachment lies in this case for that defendant had no attachable interest in the potatoes. Defendant having appeared and answered and defended generally, this question is no longer jurisdictional in its nature, it is not raised in the pleadings nor is it an issuable question as a matter of right. In such case, objections of law or fact to the sufficiency of the affidavit or in general to the validity of the attachment as ancillary to the principal demand should be raised and presented by motion in the cause or, in some instances, by special objection to the form or amount of the judgment. *Mfg. Co. v. Steinmetz,* 133 N. C., 192. And if it were otherwise, the goods, as stated, having been shipped to defendants' own order and rejected by plaintiffs because not in compliance with the contract specifications, title to the goods was in the defendants at the time of attachment levied. *Bank v. R. R.,* 153 N. C., 346; *Ashboro, etc., v. R. R.,* 149 N. C., 261; *Development Co. v. R. R.,* 147 N. C., 503. Even when goods are shipped under an open bill of lading, on a contract of this character, and when the shipment is to be made by common carrier, for delivery at a distant point, the consignee has the right of reasonable inspection in order to ascertain if the shipment is in accord with the contract. Speaking to the subject in 23 R. C. L., p. 1433, title "Sales," sec. 256, the author pertinently says: "It is the general rule that where goods are ordered of a specific quality, which the seller undertakes to deliver to a carrier to be forwarded to the buyer at a distant place, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination; in such a case the carrier is not the agent of the buyer to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them," citing *Pope v. Allis,* 115 U. S., 363; *Eaton v. Blackburn,* 52 Ore., 300, and other cases in support of the text. In the Oregon case, a very satisfactory statement of the position very generally prevailing is given and appears in the first three head-notes of the case as reported in 16 Anno. Cases, p. 1198, as follows:

"Under an executory contract for the sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality the vendee is not bound to accept them, and unless he does so, he is not liable therefor. This necessarily gives to the vendee the right of inspection, and he must be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides.

"A vendee of merchandise shipped from a distant point, under a contract specifying the quality of the merchandise and providing for its delivery f. o. b. at the point of shipment, but which contains no provisions as to the time or place of payment, inspection or acceptance, is entitled to a reasonable time after the merchandise arrives at its destination in which to inspect it at that point, and to reject it if it does not comply with the contract.

"Assuming, without deciding, that where merchandise is sold under a contract providing for its delivery to a carrier f. o. b. at the point of shipment, title vests in the vendee, for some purposes, at the time when the merchandise is delivered to the carrier, such title is, nevertheless, conditional as between the vendor and vendee, the condition being that the merchandise shall be found to be of the quality called for by the contract; and such conditional vesting of title in the vendee does not prevent the latter from exercising his right of inspection when the merchandise arrives at its destination."

And *Bean, C. J.,* delivering the opinion, refers also with approval to *Pierson v. Crooks,* 115 N. Y., 539, and *Alden v. Hart,* 161 Mass., 576, in further illustration of the correct principle. In any aspect of the matter, therefore, on the facts as established by the jury, the title to the potatoes was in the defendants at the time of attachment levied.

Defendant objects, further, that W. W. NewBern, a witness for plaintiffs, who examined the potatoes on arrival at Elizabeth City, and testified as to their condition, was allowed to give his opinion, based upon such examination as to their condition on 2 August when taken out of cold storage. This witness had previously stated, after giving description of potatoes on arrival, that he had had sixteen years experience handling potatoes, handling from 5,000 to 10,000 barrels of seed potatoes each year, some from cold storage and some not, and knew from experience the effect of cold storage upon them. On such statement and under numerous decisions of the Court the opinion of this witness was clearly competent. *Hux v. Reflector Co.,* 173 N. C., 97; *Morriset v. Cotton Mills,* 151 N. C., 31; *Wilkinson v. Dunbar,* 149 N. C., 20. Speaking to its reception in *Wilkinson v. Dunbar, supra,* the Court said:

"Testimony of this kind, from such a source, is coming to be more and more allowed in investigations of this character, and the courts are disposed to admit 'opinion evidence' when the witnesses have had personal observation of the facts and conditions, and from their practical training and experience are in a condition to aid the jury to a correct conclusion. While not expert testimony in the strict sense of the word, it is coming to have a recognized place in the law of evidence."

After careful consideration we find no error as to exceptions appearing in defendant's appeal, and on such questions we are of opinion that the judgment should be affirmed.

No error.

PLAINTIFF'S APPEAL.

Meekins & McMullan for plaintiff.
Robert J. Woodruff and George J. Spence for defendants.

HOKE, J. Plaintiff excepted and appealed from a ruling of the court restricting the amount of damages to the $500 advanced as a deposit. The plaintiff having, as established by the verdict, rightfully exercised his privilege of rejecting the potatoes because not in compliance with the specifications, the title to the goods remained in the defendants, plaintiffs are assuredly entitled to recover the $500 paid on deposit, and, as now advised, we see no reason why, in addition to this amount, they should not be allowed to recover the difference between the contract and market price at the time and place of delivery, as provided in the executory contract, f. o. b. New York, 1 August, 1917, this being the rule ordinarily applicable in such cases and illustrated and applied in numerous decisions of this Court on the subject. *Flour Mills v. Distributing Co.*, 171 N. C., 708; *Tillinghast v. Cotton Mills*, 143 N. C., 268; *Hosiery Co. v. Cotton Mills*, 140 N. C., 454; *Coal Co. v. Ice Co.*, 134 N. C., 574.

For the error indicated and on plaintiff's appeal there will be a new trial on the issue as to damages, and it is so ordered.

Partial new trial.

JOHN R. CLEMENTS, ADMINISTRATOR OF CLINTON CLEMENTS v. ELIZABETH CITY LIGHT AND POWER COMPANY.

(Filed 17 September, 1919.)

1. **Employer and Employee—Master and Servant—Electricity—Dangerous Instrumentalities—Appliances—Duty of Master—Delegation of Duty—Contracts.**

   An employer may not contract with his employee to do dangerous work, such as lineman for an electrical power plant, the latter to furnish his own tools and appliances, and thus avoid his duty to furnish his employee with proper ones for the purpose, such being in effect to permit him to contract against his own negligence.

2. **Employer and Employee—Master and Servant—Contributory Negligence—Assumption of Risks—Electricity—Evidence—Verdict.**

   Where upon issues of contributory negligence and assumption of risks, in an action to recover of the intestate's employer for his alleged killing while engaged in his duties as a lineman for an electric power plant, there is evidence tending to show that the intestate was a lineman of long experience and was killed while replacing a cross-arm in his own way near the top of a pole, preferably using his own leather gloves, considered unsafe for the purpose, while rubber gloves were considered safe: and knowing the danger, permitted two wires, highly charged, to come in close proximity with each other, which he could have readily avoided by another and available method, and the shock that caused his death was through the hand, with the leather gloves on, being in contact with one of these wires: *Held*, sufficient to sustain an adverse verdict to the plaintiff, and under a charge free from error the verdict will be sustained on appeal.

3. **Evidence—Master and Servant—Employer and Employee—Contributory Negligence—Assumption of Risks.**

In an action to recover damages of an electric power plant for the negligent killing of a lineman employed by it, and there are issues properly submitted on the questions of contributory negligence in his using his own leather gloves instead of rubber gloves, in catching hold of a heavily charged wire by reason of its proximity to another such wire, which he should have kept apart; and also, upon the issue of assumption of risks, testimony by an expert witness is competent which tends to show he had previously warned the deceased of the danger, and that he had used an improper glove of his own selection.

4. **Appeal and Error—Issues—Evidence—Harmless Error.**

Evidence bearing upon one issue in the case on appeal, when the case is conclusive upon the answer to another one, is immaterial, and its admission, if improper, is not reversible error.

APPEAL by plaintiff from *Devin, J.*, at January Term, 1919, of PASQUOTANK.

This is an action to recover damages for the wrongful death of the plaintiff's intestate, caused, as the plaintiff alleges, by the negligence of the defendant, in that it failed to furnish the intestate reasonably safe tools and appliances with which to do his work, to wit, rubber gloves. 2. That it failed to furnish sufficient help for the work that was being done.

The evidence tended to prove that the plaintiff's intestate was an experienced lineman and had been engaged in that work for several years; that at the time he was employed by the defendant, some two or three weeks before his death, it was the understanding between him and the superintendent of the defendant that he was to furnish all his equipment, including gloves; that at the time of his death he was engaged in removing from one of the company's poles a "dead arm," by which is meant a rotten arm, and replacing it with a new one; that he had been sent to do this work by the general manager of the defendant; that after taking the rotten arm from the pole and either lowering it or throwing it down he unloosed his safety belt and started down the pole, and as he passed through the wires his hand, on which were leather gloves, came in contact with one of the wires charged with 2,300 volts; that he was then seen to throw back his head, hang for an instant while fire flashed from his hands, and then fall; and that he was killed; that the insulation on the wires where the intestate was working were badly worn; that they had been permitted to remain in this condition for a long time; that an arm cannot be removed and replaced by one man.

It was also in evidence for the defendant that the intestate was employed to do extra work and not regularly; that at the time of his employment he stated that he had all the necessary appliances for his work—tools, climbers, gloves, etc.—and that he preferred to work with his own tools; that at the place where he was killed there was a high-power wire of opposite polarity on each side of the pole; that at this point the wires crossed the street on an angle which caused one of the wires when removed from the arm to rest against the pole and caused the other to swing off unless tied to the pole before removing from the arm; that the intestate removed both wires and allowed one to rest against the pole, and instead of tying the other lifted it over the top of the pole and allowed it to rest close to the other wires; that in doing this he came in contact with both wires, and not having his safety belt fastened and having on leather gloves he was shocked by the voltage of the wires and was thrown to the ground, crushing his skull and causing his death.

Upon the trial, one Bains, a witness for the defendant, was permitted to testify, over the objection of the plaintiff, that he told the intestate not long before his death that he had better be careful that the current he was then working on would kill him and that the intestate replied that this current wouldn't hurt him, that he was not afraid of it, that he could bite it in two, that he had been working on wires in Norfolk carrying 11,000 volts. Also that the intestate used leather gloves nearly all the time and that they were worthless as a protection from shock.

The plaintiff excepted to the admission of this evidence.

One Lewis, a witness for the defendant, who was an expert, was permitted to testify, over the objection of the plaintiff, that there was no occasion for another man to help the plaintiff, and the plaintiff excepted.

At the conclusion of the evidence the plaintiff asked the court to charge the jury that even if the intestate contracted to furnish his own gloves that this would not release the defendant of its duty to furnish reasonably safe appliances, which was refused, and the plaintiff excepted.

His Honor charged the jury fully as to the duty to furnish the plaintiff a reasonably safe place in which to do his work and reasonably safe tools and appliances, and among other things as follows: "But if you find from the evidence that the plaintiff's intestate undertook to provide his own gloves and that he was injured by reason of their being defective gloves, there would be no liability resting upon the defendant, he was injured by reason of these being defective gloves; if the defendant did not furnish them and intestate used his own gloves defendant could not be held responsible for their condition." And again: "Now, upon the other hand, the defendant contends you ought to answer the first issue 'No,' that there was no negligence on the part of the defendant, or if you answer the first issue 'Yes' you should answer the second and the third issue 'Yes,' or one or more of them; that as a matter of fact that the man's death was not attributed to the fault of this defendant but entirely to his own act and deed; that he furnished his own tools, not only his own gloves but spurs and belt and pliers and other instruments which are used by a lineman; that they never furnished him any gloves; he furnished his own gloves. That they had an agreement between them, whether that would be binding in some respects or not, that they were not responsible for the condition of the gloves, and they invoke that principle of law and contend that you should observe that they are not liable on account of defective gloves."

The jury returned the following verdict:

1. Was plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: "No."

2. Did plaintiff's intestate, by his own negligence, contribute to his own injury and death, as alleged in the answer? Answer: "Yes."

3. Did plaintiff's intestate assume the risk of injury and death, as alleged in the answer? A. "Yes."

4. What damage, if any, is plaintiff entitled to recover? Answer:——

Judgment was entered upon the verdict in favor of the defendant, and the plaintiff excepted and appealed.

Ehringhaus & Small attorneys for plaintiff.
Hughes, Little & Seawell and W. A. Worth attorneys for defendant.

ALLEN, J. The rule is well established that the duty imposed upon the employer to provide a reasonably safe place to work and reasonably safe tools and appliances is nondelegable (*Mincey v. R. R.*, 161 N. C., 470), and so important and necessary do we regard this principle that we would not permit it to be modified or weakened by contract between the employer and employee requiring the employee to furnish his own tools and appliances.

Indeed, if this should be allowed the rule could be easily abrogated, and the employer would be afforded the opportunity to contract against his own negligence.

We would therefore be inclined to grant a new trial if the verdict stopped with the first issue, but the jury has gone further and has answered the issues of contributory negligence and assumption of risk against the plaintiff, and in the consideration of these last issues it was proper to have before the jury all the facts and circumstances including the use of leather gloves, and upon the second and third issues the use by the plaintiff of the leather gloves belonging to him was given no effect except as a circumstance tending to establish the defendant's contention on the issues of contributory negligence and assumption of risk.

In *Hicks v. Cotton Mills,* 138 N. C., 320, and *Pressly v. Yarn Mills,* 138 N. C., 415, two leading authorities on the respective duties of employer and employee, after holding that the duty of the employer to furnish a reasonably safe place to work and reasonably safe tools and appliances is absolute, the Court says in the latter case: "On the second issue, that addressed to the question of contributory negligence, the judge charged the jury in substance that if they should find from the evidence that the injury would not have happened if the defendant had supplied the machine with a shifter, and this was the proximate cause of the injury, this would be continuing negligence and they should answer the second issue 'No,' though the plaintiff may have been negligent in the use of the machine. As we have held in *Hicks v. Cotton Mills, supra,* this is not a correct proposition as to every negligent failure on the part of the employer to furnish a safe appliance by reason of which the injury occurs, and is not the law in cases of the character we are now considering. The employee is not in such instances absolved from all obligation to act with reasonable care and prudence, and if there is negligence on his part, concurring as the proximate cause of the injury, the plaintiff cannot recover."

It has also been held that "When the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care." *Covington v. Furniture Co.,* 138 N: C., 374; *Mace v. Mineral Co.,* 169 N. C., 146.

Applying these principles we find the evidence on the issue of contributory negligence full and almost uncontradicted, and as it has been submitted to the jury under instructions free from error, the finding thereon is sufficient to sustain the judgment.

The intestate of the plaintiff was a lineman of ten or twelve years experience. He knew the dangers of his employment and the tools and appliances he ought to use. He represented to the manager of the defendant at the time of his employment he had the tools and appliances necessary for his work and that he preferred to use his own. He discovered the need of repairs at the place where he was injured, and undertook to do the work in his own way and with tools selected by himself. He used leather instead of rubber gloves, and after he had detached the high-power wires on each side of the pole from the arm, instead of keeping them apart, which he could have done, thereby rendering them harmless so far as he was concerned, he placed them near each other, which was very dangerous, and thus brought about his death by his own want of care.

The statement in the former opinion as to the use of gloves furnished by himself, thus considered in connection with the other circumstances, which are now fully developed, is free from criticism when restricted to the second issue.

The evidence of Bains was competent to show special notice to the intestate of the danger of the work he was doing, and that he used a defective appliance of his own selection.

The evidence of Lewis is immaterial in the view we take of the appeal, as it has no bearing on the second issue.

No error.

PEARL SCOTT WALKER ET ALS. v. D. W. WOODHOUSE ET ALS.

(Filed 17 September, 1919.)

1. **Trusts—Interest—Necessaries—Verdict.**

   Where a sum of money is held in trust for the minor daughter of the trustor until she shall become twenty-one years of age, allowing the sum of one hundred dollars to be expended for her education, and it is established by the verdict of the jury that this and an additional amount was expended by the trustee for her necessary expenses during her minority, including those of her marriage, and that under the terms of the trust the trustee had kept the money separate from his own, and that he was not chargeable with interest thereunder: *Held*, the amount expended for necessaries was properly deducted from the trust fund in making the settlement with the *cestui que trust*, and no interest was chargeable to the trustee therein.

2. **Pleadings—Answer—Interpretation—Trusts—Conditions—Issues.**

   Under our Code practice an answer must be liberally construed as a whole, and technical inaccuracy or lack of precision will not deprive the defendant of a defense, if any portion thereof presents facts sufficient, or

if allegations of sufficient facts may be gathered from it, every reasonable intendment and presumption being in favor of the pleader; and where in one paragraph of the answer the defendant, trustee, in an action by the *cestui que trust*, admits having the trust fund and tenders it "whenever she executes" a certain deed, and consents to judgment against him therefor upon her executing this deed, in other paragraphs of the answer, it is sufficient to raise the issue as to the execution of the deed being a condition under which the defendant was required to pay over the trust funds.

APPEAL by all parties from *Devin, J.,* at March Term, 1919, of CURRITUCK.

This action was instituted by the plaintiff to recover the sum of $1,000 and interest alleged by her to have been bequeathed to D. W. Woodhouse to hold in trust for the plaintiff by and under the terms of the will of Hiram Gregory, deceased. The defendant answered, admitting that he had received $1,000, but denying that he had received such amount, or any part thereof, under the terms of said will, and averring that he had received same during the lifetime of Hiram Gregory under a parol agreement whereby he was to hold same in trust for the plaintiff. The allegations of the defendant with respect to the trust, under the terms of which the jury found he held said money, are set out in sections ten, fifteen and sixteen of the answer, as follows:

"10. For further defense the defendants aver that shortly before the death of Hiram Gregory, grandfather of the feme plaintiff, the said Gregory left with the defendant Woodhouse the sum of $3,000, which, by agreement, was to be placed in the safe of the said Woodhouse and to remain there until his grandchildren, May, Elsie and Pearl Scott, should become twenty-one years of age, at which time the said defendant was to pay over to said three grandchildren $1,000 each out of the money so left, without interest, with the right to expend as much as $100 on each child for education. And with this understanding and agreement the said D. W. Woodhouse accepted the $3,000, and has kept the same separate and apart for the said grandchildren in his safe, and has not used it or mingled it with his own funds, but has at all times kept it in his safe in accordance with the request and agreement made with Hiram Gregory and referred to in his will."

"15. The defendant Woodhouse admits and has always admitted that he has in hand of the $1,000 left with him for the feme plaintiff upon her execution of her interest in the deed after she became twenty-one years of age the sum of $429.12, which he herewith tenders to the plaintiff, and has always been ready to pay the same over to her; that the money is now in his safe and has been in his safe and ready to be paid over to her whenever she executed the deed as set out in the will. He also owes her $81.40, with interest thereon from 15 April, 1910, being the amount which he received from S. M. Beasley, executor of Hiram Gregory, the grandfather of feme plaintiff; that he has always been ready to settle this with her when she became of age, and does hereby tender it to her with interest."

"16. The defendant consents that upon execution of the deed by plaintiffs as stipulated in the will the plaintiffs may have judgment against him for the above amounts so tendered and the cost up to the filing of this answer and the final judgment, and that a decree may be so entered."

The defendant, trustee, further contended that of the $1,000 so received he had advanced the plaintiff during her minority at her request the sum of $570.80 for necessaries, which she promised to pay out of said sum, of which $200 had been advanced for the purpose of meeting her expenses incidental upon her marriage. Plaintiff was married at the age of sixteen. The plaintiff admitted that the defendant had expended $570.80 for her benefit and at her request, but contested her liability to be charged therewith unless the defendant consented to pay interest, which he refused to do because by the terms of the trust he was to pay no interest and was to keep the money in his safe for the plaintiff, which he did. Upon the third issue, to wit, "What amount has defendant paid out for necessaries for plaintiff prior to her coming of age?" plaintiff in apt time requested the court to charge the jury as follows:

"The court instructs you that, upon all the evidence in this case if you find the facts to be as testified, your answer to the third issue should be $100; that in no view of the case can you answer said issue in a larger amount."

Refused, and plaintiff excepted.

The defendant offered evidence tending to prove that it was one of the conditions of the trust that the plaintiff should execute a deed to Hiram, the grandson of Hiram Gregory, conveying to him her interest in what is known as the Hobbs tract of land before receiving any part of the money, and tendered an issue to be submitted to the jury involving this question.

His Honor excluded the evidence and refused to submit the issue upon the ground that the answer did not allege that this was a part of the trust, and the defendant excepted to each of these rulings.

The jury returned the following verdict:

1. Did the defendant receive the sum of one thousand dollars under the will of Hiram Gregory to hold in trust for the plaintiff, Pearl Scott Walker, as alleged in the complaint? Answer: "No."

2. Did the defendant Woodhouse receive the sum of $1,000 from Hiram Gregory during his lifetime to hold in trust for the plaintiff, Pearl Scott Walker, as alleged in the answer? Answer: "Yes."

3. What amount has defendant paid out for necessaries for plaintiff prior to her coming of age? Answer: "$370.80."

Judgment was entered thereon in favor of the plaintiff for the sum of $1,000, subject to a credit of $370.80, and the plaintiff appealed upon the ground that the defendant could not be credited with more than $100.

The defendant also appealed, alleging as error the refusal to admit evidence and to submit the issue as to the execution of the deed by the plaintiff conveying her interest in the Hobbs tract.

Meekins & McMullan and Thompson & Wilson attorneys for plaintiff.

Aydlett, Simpson & Sawyer and Ehringhaus & Small attorneys for defendant.

ALLEN, J. There is no error on the plaintiff's appeal as the limitation on the amount to be expended by the trustee in behalf of the plaintiff refers only to the education of the plaintiff, and as the jury has found, and she practically admits, that the sum of $370.80 was advanced by the defendant at her request and for necessaries, it was proper to charge her with this amount.

The defendant is not chargeable with interest because the jury has found that he received the sum of $1,000 to hold in trust as alleged in the answer, and the answer alleges that the trust was accepted with the understanding that he was not to be charged with interest and was to keep the money in a safe separate and apart from other funds, which he did.

The question presented by the defendant's appeal depends upon a construction of the answer as it is clear that he was entitled to offer evidence as to all of the terms of the trust and to have an issue submitted thereon if the pleadings raised the issue.

His Honor was of opinion that the terms of the trust were alleged in section 10 of the answer, and as the plaintiff failed therein to allege that the plaintiff was required to execute the deed before receiving any part of the money left with him, the evidence was not competent because there was no allegation and that no such issue was raised by the pleadings, but under the Code system which prevails in this State the answer must be considered as a whole; it must be "liberally construed," and if it can be seen from its general scope that a defense is alleged, the fact that it has not been stated with technical accuracy or precision will not deprive him of the defense. If in any portion of the pleading it presents facts sufficient to constitute a defense or if facts sufficient for that purpose can be gathered from it, the pleading will stand as every reasonable intendment and presumption must be made in favor of the pleader.

Brewer v. Wynne, 154 N. C., 472, and applying this principle we are of opinion that the defendant sufficiently alleges that the plaintiff was required to execute the deed as a condition to receiving the money.

In section 15 of the answer the defendant admits that he has the money in hand "left with him for the feme plaintiff upon her execution of her interest in the deed after she became twenty-one years of age," and he tenders the balance due which he says he is ready to pay "whenever she executed the deed"; and in section 16 the defendant consents for judgment to be entered against him for the balance due "upon the execution of the deed to the plaintiff."

It would have been better and more orderly for the defendant to have set out all of the terms of the trust in section 10 of the answer, but upon an inspection of the whole pleading it is a reasonable and fair construction that section 10 was directed particularly to those parts of the trust by which the amount to be recovered would be ascertained, and sections 15 and 16 to the condition upon which she would be entitled to the money.

It is therefore ordered that the judgment upon the plaintiff's appeal be affirmed and that upon the defendant's appeal it be reversed with directions to submit an additional issue as tendered by the defendant. The issues as found by the jury will not be disturbed.

Plaintiff's appeal affirmed.

Defendant's appeal reversed.

TOWNSHIP ROAD COMMISSION OF No. 10 TOWNSHIP v. THE BOARD OF COMMISSIONERS OF EDGECOMBE COUNTY.

(Filed 17 September, 1919.)

1. Constitutional Law—Taxation—Municipalities—Statutes.

The provisions of Art. VII of our State Constitution, secs. 3, 4, 5, 6, relating to municipal taxation, are subject to those of section 14 thereof, to the effect that the Legislature shall have power by statute to modify, change or abrogate any or all provisions of the sections enumerated.

2. Taxation—Statutes—Bonds—Municipalities.

Under the provisions of ch. 122, Public Laws of 1913, townships may establish and maintain a township road system under its separate governance, but the method is restricted to an issuance of bonds for road purposes upon the approval of its voters, and to taxation limited to the payment of the interest on the bonds, without provision for the working or maintenance of the roads directly by current taxation.

3. Statutes—Amendments—Interpretation.

Chapter 297, Public Laws 1917, amending ch. 122, Public Laws 1913, should be construed together to ascertain their true intent and meaning:

and *semble,* no authority is given a township to work its roads by current taxation.

4. **Townships—Powers—Statutes.**

Townships have no corporate powers, municipal or otherwise, except those expressly conferred by legislative enactment, and only to the extent thereby conferred. Rev., sec. 1318, subsec. 3.

5. **Constitutional Law—Taxation—Townships—Counties.**

Article II, sec. 14, of our Constitution, requiring that statutes for creating or imposing taxes shall be passed by readings on separate days, with "aye" and "no" vote, etc., refers in express terms to State, counties, cities and towns, and applies to townships also as constituent parts of counties.

6. **Same—Amendments—Bonds—Material Changes.**

Chapter 279, Public Laws 1917, purports to amend ch. 122, Public Laws 1917, and the former act was not passed in accordance with the formalities as to its separate readings with the "aye" and "no" vote taken as required by Art. II, sec. 14, of our State Constitution: *Held,* the amendment purported to change the method of maintaining a separate township road system from a bond issue restricted in amount to current taxation from year to year, etc., and made a material change in the valid act it proposed to amend, and is unconstitutional, and the commissioners are without authority to levy the tax specified in the later act.

CONTROVERSY to determine the question whether defendants can be compelled to lay special township tax for road purposes, heard on case agreed before *Bond, J.,* at June Term, 1919, of EDGECOMBE.

The pertinent facts appearing in the case agreed are as follows:

1. That the township road commission of No. 10 Township is a corporate body, duly created and existing under and by virtue of the Public Laws of the State of North Carolina. That the board of commissioners of Edgecombe County exercises control of the affairs of the county under and by virtue of the laws of North Carolina.

2. That on 17 April, 1919, under the provisions of ch. 122, Public Laws 1913, and the amendment thereto by ch. 279, Public Laws 1917, W. L. Dunn and 107 other qualified voters of No. 10 Township duly petitioned the board of commissioners of Edgecombe County, said 108 being more than one-fourth of the qualified voters of said township, to call an election to determine the will of the voters of said township, as to whether or not to establish a township road district, to create and appoint a township road commission, and to levy a special road tax of 40 cents on the $100 value of property and a poll tax of $1.20.

3. That at the election duly ordered and held in said No. 10 Township on 21 May, 1919, the vote was 131 to 30 in favor of establishing said township road district, creating and appointing said township road commission, and levying said special road tax, said 131 being more than a majority of the qualified voters of said No. 10 Township.

4. That on 2 June, 1919, at the regular meeting of the said board of commissioners of Edgecombe County, the result of said election was duly certified to the said board. That the said board of commissioners duly created the said township road district of No. 10 Township, and duly appointed W. L. Dunn, W. B. Walston, and A. J. Walston as the township road commission of No. 10 Township, but refused to levy the said special road tax voted for in said election.

5. That the said ch. 122, Public Laws 1913, was duly and constitutionally enacted, and that the amendment thereto, as set out in chapter 279, Public Laws 1917, was duly certified by the presiding officers of both houses of the General Assembly and duly enrolled, but that said amendment was not read and passed on three different days and the yeas and nays on the second and third readings entered on the journal. That the said ch. 122, Public Laws 1913, and the amendment thereto by ch. 279, Public Laws 1917, and the entire public law as amended is hereby made a part of this record.

6. That to enable the plaintiff to obtain the necessary means to develop and maintain the public roads in No. 10 Township they applied to the defendants, according to the result of said election, to levy the said property tax of 40 cents on the $100 value of property and a poll tax of $1.20 upon the property and polls of said township. That the assessed value of all taxable property situated in said township for the past ten years is of the average value of $400,000.

7. That the said defendant refused to levy the said special road tax as voted for in said election and demanded by the said plaintiff, pursuant to the vote of the people in said election, among other reasons, on the ground that the amendment as set out in ch. 279, Public Laws 1917, was not passed by the General Assembly as required by the Constitution of North Carolina, Art. II, sec. 14.

Wherefore it is agreed that if the court be of the opinion with the plaintiff the court will order the necessary writ to issue compelling the defendant to levy the said special tax, but if the court be of opinion with the defendant, the necessary order will issue dismissing the action.

There was judgment for defendant, and plaintiff excepted and appealed.

John L. Bridgers and Henry C. Bourne for plaintiff.
Allsbrook & Phillips for defendants.

HOKE, J. We concur in the ruling of his Honor that, on the facts appearing in the case agreed, the application of the plaintiff has been properly denied.

Whatever may have been the power of township boards in matters of municipal taxation existent under Art. VII of the Constitution, more especially in sections 3, 4, 5 and 6, they are subject to the provisions of section 14 of the same article to the effect that the "Legislature shall have full power by statute to modify, change or abrogate any and all provisions of the article" except sections 7, 9 and 13, these last having no bearing on the questions presented in the controversy.

Acting under the powers conferred by this section, the General Assembly, in Rev., ch. 23, sec. 1318, subsec. 3, have provided, among other things, "That no township shall have or exercise any corporate powers whatsoever unless authorized by an act of the General Assembly, to be exercised under the supervision of the board of commissioners."

By the express provisions of this statute, therefore, township boards have no corporate powers, municipal or otherwise, except those expressly conferred by legislative enactment and to the extent that the statute provides. This being the general law presently appertaining to the subject, a perusal of ch. 122, Public Laws 1913, on which plaintiff must rely in support of the relief sought by him, will disclose that it purports to provide a scheme by which townships may establish a township road system and maintain same under its separate governance and the method of raising funds for the purpose is to be by a bond issue, restricted in amount and on approval of the voters of the township. The vote is to be "For or against bonds"; the taxation authorized is to pay the interest on said bonds, and it is nowhere provided or contemplated by the act that the roads designated therein are to be worked or maintained by current taxation directly applicable to the purpose. It is contended for the appellants that while ch. 122, Laws 1913, does not authorize current taxation directly for road purposes, this power is conferred by ch. 279, Public Laws of 1917, in force at the time of the petition and election had in this instance and in which the power of direct taxation is claimed to be fully authorized. This statute is, in terms, an amendment to that of 1913 and, construing the two together, the proper method of arriving at their true intent and meaning, *Keith v. Lockhart,* 171 N. C., 451, there would seem to be no sufficient authority given to work the roads by current taxation, but if the power, as expressed, be conceded, it would not avail the plaintiffs, for the last act was not passed in accord with Art. II, sec. 14, of the Constitution, and is therefore inoperative so far as conferring the power of taxation is concerned. Although the section of the Constitution just referred to—requiring that statutes for creating debts or imposing taxes shall be enacted with certain specified formalities—refers in express terms to the State, counties, cities and towns, it has been directly held that the same applies also to townships as constituent parts of counties and will render ineffective any legislation of that character which fails to comply with its requirements. *Witkowsky v. Comrs.,* 150 N. C., 90. True we have held in *Wagstaff v. Comrs.,* 177 N. C., 354; *Gregg v. Comrs.,* 162 N. C., 479; *Glenn v. Wray,* 126 N. C., 730, and other cases where the question was directly considered, that when a principal statute had been enacted in accord with the constitutional provision referred to, an amendment "which does not increase the amount of the debt or the taxes to be levied or otherwise materially change the original bill will be upheld and constitute a portion of the law without the observance of the stated formalities," but we are of opinion that an amendment of the kind presented here, which purports to change the method of maintaining a separate township road system from a bond issue restricted in amount to current taxation from year to year, indefinite as to time, might, in its practical application, work such a change in the burdens imposed that it could, in no sense, be regarded as immaterial within the meaning of the principle and must be set aside because it was not passed with the formalities required by the organic law. *Bennet v. Comrs.,* 173 N. C., 625.

In accord with these views, we must hold that the commissioners are without valid statutory authority to levy this tax and that plaintiff's application for *mandamus,* compelling its levy, has been properly denied.

Affirmed.

H. T. DILLON v. CARL BROEKER.

(Filed 17 September, 1919.)

1. **Torrens Law — Statutes — Contracts—Specific Performance—Affidavit—Notation.**

A contract to convey lands where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by sec. 25 of the statute.

2. **Same—Courts.**

The statute called the Torrens Law, under section 28 thereof, is the only "operative act" to "affect the title to lands registered thereunder," and, construing this with the other relevant sections, a contract to convey the lands so registered is a voluntary act affecting the title thereof, and under the statutory provisions such conveyance will not be recognized until recorded accordingly; and in the absence of compliance with the statute in this respect, the courts will not decree specific performance.

3. **Torrens Law — Statutes — Registration—Contracts—Original Parties—Creditors and Purchasers.**

The statute known as the Torrens Law draws no distinction between the original parties to deeds or contracts affecting title to lands registered under its provisions and creditors or purchasers, and in respect to such registration they stand upon the same footing.

4. Torrens Law—Statutes—Remedial—Interpretation.

The Torrens Law is remedial and not in derogation of common right, and should be liberally construed, according to its intent, to advance the remedy and redress the mischief.

APPEAL by plaintiff from *Devin, J.*, at June Term, 1919, of WASHINGTON.

This is an action to compel specific performance of a contract to convey land, the defendant herein being the registered owner of the land under the Torrens Law.

The plaintiff admitted upon the trial that his contract had not been registered under the Torrens Law and that the affidavit required by section 25 of said law had not been filed.

The jury returned the following verdict:

1. Did the defendant contract in writing to convey to plaintiff the land described in the complaint? Answer: "Yes."

2. Did plaintiff, within the time provided in said contract, notify the defendant that he would take said land, and on his part do all things required of him to entitle him to a conveyance of said land by defendant? Answer: "Yes."

3. Has plaintiff at all times been ready, able and willing to perform said contract on his part, as alleged in the complaint? Answer: "Yes."

4. Did defendant refuse to perform said contract and to convey said land, as alleged in the complaint? Answer: "Yes."

5. Was summons duly issued and attachment duly issued and levied on the land described in the complaint, and docketed and indexed in the office of the clerk of the Superior Court within three days, and were notices of summons and attachment duly published as required by law, and complaint filed, all prior to any transfer of title to or conveyance of said land by defendant? Answer: "Yes."

The defendant moved to dismiss the action before the verdict. The court did not then rule upon the motion to dismiss but reserved the same, and upon the coming in of the verdict allowed the motion and dismissed the action for noncompliance with the Torrens Law, and the plaintiff excepted and appealed.

Small, MacLean, Bragaw & Rodman, attorneys for plaintiff.
Ward & Grimes, attorneys for defendant.

ALLEN, J. The Torrens Law is comparatively new in this State, having been enacted in 1913 (ch. 90, Laws 1913), and it marks so wide a departure from the principles before existent, regulating the acquisition of titles to land or any interest therein, that but little if any assistance can be had in determining its proper construction by recurrence to former statutes and decisions.

It was first adopted in Australia in 1857 at the instance of Sir Robert Torrens, which accounts for its name, and is now a part of the statute law of many of the States of this country.

As stated in Devlin on Deeds, Vol. 3, secs. 1439, 1440, "The object of the system is, first, to secure by a decree of court, or other similar proceedings, a title which shall be impregnable against any attack, and when this title is once determined, to provide that all subsequent transfers, incumbrances, or proceedings affecting the title shall be placed on a page of the register and marked on the memorial of title. The object is to secure the evidence of title exclusively by a certificate issuing from public authority.

"When title has been registered the owner who desires to sell produces his original certificate, as he would the certificate of stock in a corporation, and the buyer may safely purchase on the faith of what the certificate shows. If a sale has been affected, the old certificate is surrendered and a new one received in its place. Under this system title to land is not conveyed by a deed, as such, but only by the registration of the transfer, as in the case of the sale of the shares of stock in a corporation, and the deed, if made, is considered as nothing more than a contract between the parties by which the officer intrusted with the duty is authorized to make the transfer. As many times as a sale is made the old certificate is surrendered and a new one given in return. If a mortgage is executed, the transaction is noted on the certificate (and on record), and when it is paid its release is likewise noted. If a trust is created, proper endorsements are made; in a word, the object of the system is to make the certificate the complete repository of all that may affect the title as there is only one certificate of title on file at any time which shows the state of the title and to what extent, if any, it is affected by incumbrances."

It was with this object in view—to secure by a decree of court a title impregnable against any attack, and to make a permanent record of the exact status of the title with all liens, incumbrances and claims against it—that the statute was enacted, which "is not in derogation of common right, but is a remedial statute and to be liberally construed, according to its intent, so as to advance the remedy and repress the evil." *Lookout Co. v. Gold,* 167 N. C., 66.

When we turn to the statute we find the first nine sections devoted to procedure, and to declaring the effect of the decree at the time of its entry. In the tenth section the county commissioners are required to furnish a book to the register of deeds, "To be called registration of titles, in which said register shall enroll, register and index, as hereinafter provided, the decree of title hereinbefore mentioned and the copy of the plot contained in said petition, and all subsequent transfers of title, and note all voluntary or involuntary transactions in any wise affecting the title to said land authorized to be entered thereon." It also directs the register to issue "an owner's certificate of title," and prescribes the form.

Section 11 requires that all certificates be numbered, "And a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for said county."

Sections 12 to 25 regulate the transfers of title in whole or in part, and the creation of liens, trusts, equitable interests, tax sales, etc., with provision for noting on the book for registration of titles instruments elsewhere registered.

Section 25 provides that every registered owner under the act, with certain exceptions not material to this appeal, shall "Hold the land, free from any and all adverse claims, rights or incumbrances not noted on the certificate of title"; and further, "Any person making any claim to or asserting any lien or charge upon registered land existing at the initial registry of the same and not shown upon the register, or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the Superior Court the latter shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor the clerk shall order a cancellation of such note."

Section 27 renders adverse possession of no effect against the registered owner, and section 28, "The registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this act; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this act: *Provided*, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title."

The other sections of the act have no bearing on the question now before us. This summary of the act not only manifests a purpose on the part of the General Assembly to establish a title in the registered owner, impregnable against attack at the time of the decree, but also to protect him against all claims or demands not noted on the book for the registration of titles, and to make that book a complete record and the only conclusive evidence of the title.

In section 10 all voluntary and involuntary transactions affecting the title must be noted on the book. In section 14, "All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided by section 20 of this act." In section 25 any person making any claim "adverse to the title of the registered owner" is required to file an affidavit before the clerk, who must notify the register that he may note the claim on the book for the registration of titles, and he must then bring action on his claim within six months, unless the clerk extends the time for good cause shown, such as the claim not being due or other good reason made to appear, and if he fails to bring action the note of his claim is canceled. This is as to claim against the registered owner and not one against a purchaser from him.

In section 28 "No voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this act," and "the registration of titles book shall be and constitute sale and conclusive legal evidence of title."

The contract to convey on which the plaintiff declares is a "voluntary transaction" affecting the title, which section 10 says shall be noted, which has not been done. It is a claim adverse to the registered title, and under section 25, in order to maintain an action, he must make an affidavit and have notation made, which he has failed to do.

And under section 28 registration under the act is the only "operative act" to "affect the title to registered land"; no voluntary act "shall affect the title to registered land until registered in accordance with the provisions of this act," and "the registration of titles book shall be and constitute sole and conclusive legal evidence of title."

These provisions clearly indicate the purpose to require all claims against the title to be registered under the act, and to recognize no other, and the fact that the statute was enacted by the General Assembly with full knowledge that for near a hundred years as to mortgages, and for thirty years as to deeds, these instruments were valid between the parties without registration, and invalid as to creditors and purchasers only from registration, and that no distinction is made in the statute in favor of creditors and purchasers, is strong evidence of the intent to place the owner of the registered title, creditors and purchasers on the same footing as to registration under the act, and that no claim against either can be maintained until the act is complied with.

It follows necessarily that the judgment must be affirmed as the plaintiff admits his failure in this respect.

Affirmed.

W. W. ROGERS AND WIFE v. J. J. PILAND.

(Filed 17 September, 1919.)

1. **Injunction — Parties—Mortgages—Warranty—Deeds and Conveyances—Equity—Purchasers.**

   Where a mortgagor has sold his equity of redemption in the mortgaged lands by deed containing warranty of title he may maintain his suit to enjoin the sale by the mortgagee, as he is a party vitally interested, under his warranty; and where his purchaser is a party to the suit, objection that the mortgagor is not the proper party to maintain the suit is untenable.

2. **Waiver—Mortgages—Interest—Disputed Amounts—Tender.**

   The mortgagor of lands gave several notes secured by the mortgage, maturing at different dates, and upon the maturity of one of them, a dispute as to the whole amount of the interest then due on all the notes arose, whereupon the mortgagor, the plaintiff in the action to enjoin the sale, under the power in the instrument, tendered the proper amount of such interest, which the defendant mortgagor refused, demanding the full payment of the principal and interest of the mortgage debt, not then due according to the terms of the mortgage: *Held*, the defendant's refusal to accept the correct amount of interest due, and his conduct relating to it, was a waiver of any formal tender; and it appearing that the plaintiff was at all times able, ready and willing to pay the correct amount of the interest, and had deposited a larger amount than due in the clerk's office, an injunction against the sale was properly continued to the hearing.

3. **Waiver—Tender—Validity—Grounds for Refusal.**

   Where a creditor refuses a tender of payment as insufficient upon a specified ground he is confined thereto in a suit for an injunction against him wherein the question of the validity of the tender is involved, the debtor being ready, able and willing to pay the proper amount then due.

ACTION tried before *Connor, J.*, at April Term, 1919, of HERTFORD.

The action was brought by the plaintiffs to enjoin the sale of land, under a power contained in a mortgage to secure the sum of $2,000 with interest, which was payable in installments of $500 on 1 January, 1919, and of each succeeding year thereafter until 1 January, 1922, with interest due annually, and it was provided that in default of the payment of principal or interest when due, or any part thereof, the defendant (mortgagee) should have the power to sell for foreclosure.

Defendant, before the maturity thereof, assigned the first note to one Shaw, and this was paid by the plaintiffs, who notified the defendant thereof, and offered to pay the interest accrued on the other notes. Defendant notified plaintiffs that the amount of interest due was $111, and agreed to wait a few days for its payment. Plaintiffs offered to pay the accrued interest, or $111, but a dispute arose as to the correct amount of the interest due on the notes not yet due. On the day of this transaction (13 January, 1919) there was due on the notes secured by the mortgage only $90 and interest thereon from 19 October, 1918. At the time plaintiffs were ready, able and willing to pay the $111, but the defendant refused to receive it, although he had represented this to be the correct amount and had agreed to accept payment of it. Plaintiffs tendered a check for $120, but this was declined. He demanded instead that plaintiffs pay the full amount of the principal and interest on all the notes. This was refused, and he thereupon advertised the land for sale, and the restraining order was issued. Plaintiffs tendered the full amount due as interest and have brought $135 into court, where it is now deposited to await the result of this action.

Judge Connor found the facts substantially as above set forth, and granted an injunction to the hearing. Defendant appealed.

W. R. Johnson for plaintiffs.
Roswell C. Bridger for defendant.

WALKER, J., after stating the case: There are only two questions raised and necessary to be considered:

1. Defendant contends that plaintiffs have sold and conveyed their equity of redemption to O. L. Joyner, and therefore cannot maintain this action. This position cannot be sustained. The deed to Joyner contains full covenants of all the usual kinds, seizin, right to convey, warranty and against encumbrances. Joyner is a party to this suit. It is stated in the record that "Joyner has not paid the full purchase

price in cash, the terms for the payment of the balance on same having been made by plaintiffs upon the basis of their notes to defendant."

The plaintiffs have a vital interest in this case, although they may have conveyed their equity of redemption to Joyner. They are still mortgagors and liable on the mortgage debt, and have the right to see that the land brings a fair and full price, and if it is sold under the mortgage Joyner will lose his land, and the plaintiffs will become liable on the covenant against encumbrances in his deed. It seems hardly to need authority for the position that plaintiffs, under those facts, can maintain this action. This question was presented in *Dedrick v. Den Bleyker*, 85 Mich., 475, 482, where the contention was that the mortgagor who had sold and conveyed his equity, with full covenants, to a third party (Dedrick), was not an interested party and could not maintain an action to restrain a foreclosure by the mortgagee, but it was held that not only could this be done, but that the mortgagor and his grantee had a common interest to get rid of the mortgage, and could join as plaintiffs in the suit, if desired, as the grantee of the mortgagor would have a remedy upon the covenants in his deed, if he was compelled to pay the mortgage debt, or if he lost the land by the foreclosure, "they being all full covenant deeds of warranty," as in this case. It is said in 27 Cyc., 1539, that "a suit to restrain the foreclosure of a mortgage may be maintained not only by the mortgagor, but also by any owner of the equity of redemption deriving title from or under him. *Hubbard v. Jasinski,* 46 Ill., 160, also is directly in point.

2. As to the tender of the interest due at the time it was made, the defendant is in no position, under the facts found, to question its sufficiency. He had deceived the plaintiffs as to its amount, and when the latter offered to pay what was due, even the $111, he declined to accept the money, and peremptorily demanded the full payment of principal and interest of the mortgage debt. He was in the wrong throughout the transaction, and it would be grossly inequitable if he were permitted to take advantage of it. The mortgage was given strictly as a security for the debt due to him, and not as means of enabling him to acquire title to the land by a foreclosure, which will be unnecessary and in violation of the plaintiffs' rights under the mortgage. The time for the maturity of the whole debt had not arrived by the terms of the mortgage, and the entire debt will not mature until 1922, if the mortgagor keeps his contract by paying the interest promptly and the installments of the principal as they are due. The defendant's refusal, in advance, to accept the plaintiffs' offer to pay, and his demand of the whole indebtedness, which was not then due, was a waiver of any formal tender of the amount, and his conduct in the matter was clearly one. *Mobley v. Fossett,* 20 N. C., 93; *Abrams v. Suttles,* 44 N. C., 99; *Blalock v. Clark,*

133 N. C., 306; *Bateman v. Hopkins,* 161 N. C., 220; *Gallimore v. Grubb,* 156 N. C., 575; *Gaylord v. McCoy,* 161 N. C., 685. The debtor must be able, ready and willing to pay at the time the money is due, and this was the case here, and he has deposited the money in court to keep his tender good. *Tuthill v. Morris,* 81 N. Y., 94.

It also appears that the defendant, when the offer to pay the accrued interest was made, declined to receive it, not upon the ground that the amount was not sufficient, for he had represented that it was, or that a check was tendered, but for the reason that he had changed his mind and then demanded payment of the whole debt. This being so, he cannot now base his contention upon the ground that the tender was insufficient. He is confined to the reason he gave at the time of the tender. It is said in 38 Cyc., 141: "An objection to the amount of a tender must be made at the time the tender is made, otherwise it is waived; and where the sum tendered is less than the sum due and the tender is refused by the creditor on some ground other than that the amount is too small, as where it is claimed that the contract is forfeited, the tenderee waives the objection to the insufficiency of the amount." See, also, *Ford v. Stroud,* 150 N. C., 362, where more was demanded of the debtor than the creditor had a right to exact, and it was held to be a waiver of the validity of the tender. But here the plaintiffs tendered more than was due.

We adopt the judge's findings of fact, and upon them there is no basis for defendant's contentions.

Affirmed.

PAULINE WALTON v. ISHAM WALTON, JR.

(Filed 17 September, 1919.)

1. **Husband and Wife—Alimony—Attachment—Ancillary Remedy—Statutes.**
   Chapter 24, Public Laws 1919, is an ancillary remedy given to the wife abandoned by the husband, "to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband," thus giving her a remedy both in *personam* and in *rem.*

2. **Same—Contracts—Summons—Service—Publication.**
   An attachment against the husband's land will lie in favor of the wife, abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract, that he support and maintain her, under the statute declaring and enforcing it and under the order of court; and attachment of the husband's land is a basis for the publication of summons. Ch. 24, Laws 1919.

3. Husband and Wife—Alimony—Debtor and Creditor—Priority.

The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of his abandonment, which puts every one on notice of her claim and her priority over other creditors of her husband.

4. Attorney and Client—Special Appearance—Written Authority—Statutes.

Upon special appearance of the attorneys of the husband whose property has been attached by the wife under the statute, for the purpose of dismissing the action, the court should, on motion made, require them to file their written authority. Rev., sec. 213.

APPEAL by plaintiff from *Connor, J.,* at Spring Term, 1919, of BERTIE.

E. R. Tyler and John W. Davenport for plaintiff.
Winston & Matthews for defendant.

CLARK, C. J. This action was begun under ch. 24, Laws 1919, which was enacted as a substitute for Rev., 1567, by the plaintiff against her husband "to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband." The summons was issued 29 April, 1919, returnable 12 May, 1919. The verified complaint used as an affidavit, upon which the warrant of attachment issued, avers that the defendant in July, 1917, abandoned the plaintiff and the child of the marriage in New York, and, returning to Bertie County, brought a suit for the annulment of said marriage. The plaintiff herein defended the action and obtained judgment that the marriage was in all respects legal and binding. During the pendency of said action she obtained an order from the court that the defendant should pay her $10 monthly from 1 December, 1917, to 1 July, 1918, and the further sum of $50 as counsel fees, which he failed to do. A motion to attach him for contempt for failure to obey the order was continued to be heard later. It is further averred in the complaint, used as an affidavit, that the defendant was indicted under Rev., 3355 and 3357, for abandonment, and gave bond, but left the State with the expressed purpose and intent of placing himself beyond the jurisdiction of the court, and since that time has been a fugitive from justice and a nonresident. The plaintiff further avers that the defendant is a strong and able-bodied man earning $75 per month, and since his abandonment has inherited an interest in land in Bertie County described in the petition, and asks that she be allowed $50 per month for the support of herself and child and an allowance for counsel fees, and that the interest of the defendant be condemned to the payment of said amounts, and for an attachment in this cause against said property. The warrant was duly issued and served upon the real estate of the defendant in said county, and the court ordered the summons to be served by publication.

The defendant appearing through counsel specially moved to dismiss the warrant of attachment. This was allowed, and the plaintiff appealed.

The question presented is the right of the plaintiff to a warrant of attachment as an ancillary remedy to her cause of action. Chapter 24, Laws 1919, prescribes that the wife abandoned by her husband is entitled "to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband."

This gives the wife who has been abandoned a remedy both in *personam* and in *rem.* The attachment is to secure the property so that it may be held to satisfy the judgment when rendered and also as a basis for publication of the summons. The wife has always had the remedy of garnisheeing the salary or wages of her husband in such cases, and she is entitled to an attachment of the property for the same reason. Otherwise the defendant, pending litigation, can sell or convey his property, or creditors may attach it for debt or obtain prior liens by judgment.

The defendant contends that an attachment does not lie under Rev., 758, unless there is a breach of contract express or implied. We are of opinion that the husband is under an implied contract for he is primarily liable for the support and maintenance of his wife. *Levi v. Marsha,* 122 N. C., 567.

In *Archbell v. Archbell,* 158 N. C., 417, it was held that the "right of a married woman to support and maintenance is primarily a property right, and the Legislature has given the wife the right to sue for such support." *Cram v. Cram,* 116 N. C., 293.

This obligation is declared and enforced by statute, and this action therefore by the wife is on the implied contract. The defendant being a nonresident of this State and a fugitive from justice, the warrant of attachment properly issued under Rev., 758, for such cause.

An attachment lies for unliquidated damages arising out of breach of contract. *Foushee v. Owen,* 122 N. C., 360; *Judd v. Mining Co.,* 120 N. C., 397.

The only way the court could obtain jurisdiction of the defendant and his property in this case is by attachment. *Everitt v. Austin,* 169 N. C., 622. The property is within the jurisdiction of the court; the defendant is not. The court could not enforce the statutory provision, ch. 24, Laws 1919, "to secure her the reasonable subsistence allotted on the estate of her husband" otherwise, and the statute would be nugatory for the defendant is beyond the jurisdiction of the court. The plaintiff is entitled to an attachment of the property and publication of notice to the nonresident defendant. *Bernhardt v. Brown,* 118 N. C., 701; *Armstrong v. Kinsell,* 164 N. C., 127.

Besides, the plaintiff is also seeking to enforce the judgment of $120 for alimony and counsel fees allowed in the former action, which judgment is an implied contract.

In *Pennington v. Bank,* 243 U. S., 269, a proceeding like this, the court sustained the right of the wife to attach the deposit in bank of the nonresident husband for payment of alimony. In that case the court says: "In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or unliquidated, like the claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of the proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt—that is, it will be valid not in *personam* but as a charge to be satisfied out of the property seized."

The following cases from other States also sustain the rule that alimony may be enforced by seizing the property of the absent defendant by attachment or similar process at the commencement of the suit. *Hanscom v. Hanscom,* 6 Colo. App., 97; *Thurston v. Thurston,* 58 Minn., 279; *Wood v. Price,* 79 N. J. Eq., 1.

The following sustain the proposition that "the wife's inchoate right to alimony makes her a creditor of the husband": *Livermon v. Boutelle,* 11 Gray, 217; *Thurston v. Thurston, supra; Murray v. Murray,* 115 Cal., 266; 37 L. R. A., 626; 56 Am. St., 97; *Hinds v. Hinds,* 80 Ala., 325.

Another case on all-fours with the present is *Pendleton v. Pendleton,* 112 S. W. (Ky.), 674, which holds that where a husband, having an interest in real estate, left the State and remained away for about a year, and during that time failed to contribute to the support of his wife and children, the court properly sustained an attachment against his property to enforce such support.

The wife's remedy by attachment puts every one on notice of her claim, and she does not lose any priority as against the other creditors of the husband. If the attachment was denied her the husband could sell the property or permit it to be exhausted by other judgments, thus making the decree for alimony nugatory when obtained. The wife and children in the meantime would be left destitute.

The order dissolving the attachment must be reversed and the attachment reinstated.

The plaintiff further contends that the court committed error in refusing to grant her motion to strike out the special appearance of counsel upon the ground that the defendant, being a fugitive from justice and absent from the State, "stands in the attitude of defiance to its power," as was said in *Cromer v. Sell,* 149 N. C., 164.

We need not pass upon this question as the plaintiff is entitled to reinstatement of her attachment, but we think the court should at least have required counsel for defendant to file written authority from the defendant as required by Rev., 213.

Reversed.

C. F. BRYANT v. A. C. BRYANT.

(Filed 17 September, 1919.)

1. **Evidence — Trusts—Parol—Letters—Hearsay—Appeal and Error—Prejudice—Reversible Error.**

Where the evidence is conflicting and close in a suit to engraft a parol trust in land conveyed to the defendant by deed absolute upon its face, and the plaintiff has introduced an unregistered deed to himself conveying an outstanding dower interest in the lands, claiming that the defendant had paid the purchase price in pursuance of the alleged parol agreement, which the defendant denied, the admission of a letter explanatory of the deed from the widow, introduced by the plaintiff himself, and not through her as a witness, tending to corroborate plaintiff's testimony that defendant paid the money for this deed, is hearsay, prejudicial, and reversible error, as it appears to have been used for the purpose of establishing the trust.

2. **Evidence—Letters—Hearsay.**

A letter from a third person written to the son of the plaintiff, tending to corroborate his evidence on a material fact involved in the action, may not be introduced in evidence, and the facts therein vested must be proved by the writer under oath as a witness, such being hearsay and *res inter alios acta.*

3. **Appeal and Error—Objections and Exceptions—Objectionable as a Whole.**

Where evidence, admitted on the trial of an action, is excepted to and the whole is objectionable as hearsay, the rule that the party is required to single out and except to such evidence only as is objectionable, where some thereof is competent, cannot apply.

ACTION tried before *Guion, J.,* and a jury at May Special Term, 1919, of BERTIE.

Plaintiff C. F. Bryant brought suit against his brother, A. C. Bryant, to establish a parol trust. He alleged that the administrator of the estate of his father filed a petition to sell the land in controversy to make assets; that a sale was ordered and the land was advertised for sale during the year 1887, and that the plaintiff, C. F. Bryant, and the defendant, A. C. Bryant, desiring to own said land together, agreed that A. C. Bryant should attend the public sale at the courthouse door in Windsor, N. C., and bid off and purchase said land for both C. F. Bryant and himself, pay for the same and take title in his own name, and hold the same in trust for both C. F. Bryant and himself; and that after payment by plaintiff to A. C. Bryant of his half of the purchase price that the latter would convey in fee simple to C. F. Bryant his share of the land. That A. C. Bryant attended the sale and purchased the land, in furtherance of this agreement, and took title therefor in trust for himself and C. F. Bryant by the deed to him, which is recorded, and now holds said title in trust as above set out.

Defendant denied that he purchased the land for the benefit of himself and his brother, or that his brother had any interest in the land; and pleaded further, that if the allegations of the complaint are true, the plaintiff had failed to diligently press his claim and that it was barred by laches and lapse of time. Defendant also contended that plaintiff had abandoned such equity as he may have had by consenting to a sale of the land by the defendant to Dr. Jenkins, who occupied it for five years and then reconveyed it to the defendant.

Defendant's motion for judgment of nonsuit was overruled at the close of plaintiff's evidence and again at the conclusion of all the evidence.

Defendant contended that the evidence is not sufficient to establish a parol trust, and further, that the uncontradicted evidence shows that the equity was abandoned, if any ever existed. Plaintiff testified that after he moved on the land in 1896 he consented to a sale of the part which he now claims, and that the defendant thereupon sold it to Dr. Jenkins. He further testified that Dr. Jenkins went into possession of the land and remained there five years. The defendant testified that Dr. Jenkins bought the land claimed by plaintiff for $300, and that after remaining in possession five years Dr. Jenkins gave it up. Dr. Jenkins corroborated this testimony. Defendant further contended that upon plaintiff's own evidence this action is barred by lapse of time. The sale was made in 1887; suit was brought thirty years later in 1917.

Plaintiff offered in evidence an unrecorded deed from Millie Futrell to plaintiff, dated 2 April, 1888, purporting to convey to plaintiff her dower interest in the land in controversy. Millie Futrell was the widow of Samuel Bryant, original owner of the land. The case on appeal contains the statement that this deed was not recorded. Plaintiff testified on cross-examination, after the deed had been admitted in evidence, "I took this deed in 1888, and have never had it recorded." Defendant, in due time, objected to the introduction of this deed and assigned the admission of it as error. Plaintiff testified that after the purchase of the land at the courthouse door defendant furnished the money to buy the dower interest of Millie Futrell, widow of Samuel Bryant. Defendant denied this. Plaintiff was permitted to introduce a letter from Mrs. Futrell (which was written since suit was brought), in which she states that A. C. Bryant paid her for the land. Mrs. Futrell was not present at the trial. The letter was directed to the son of plaintiff, and defendant contends that it is simply an unsworn statement by a third party, who was not then present, and that it was harmful. The facts about the letter are as follows: It purported to be a letter from Mrs. Millie Futrell, widow of Samuel Bryant, deceased, to M. L. Bryant, son of C. F. Bryant. This letter was a reply to a letter written to her by Bryant, in which he inquires the reason why she conveyed her dower interest in these lands to A. C. Bryant. She replied, in answer to this question, that some twenty-five years ago she thought she had conveyed her dower right to A. C. Bryant, the defendant, and that about two years ago A. C. Bryant saw her and said that he had no deed for it and wanted a deed; and that in consideration of A. C. Bryant paying her the sum of $10 she then made A. C. Bryant a deed for the dower right. Further, that somebody back in 1888 had paid her $150 and that she thought it was A. C. Bryant, and for this reason she made him a deed for the consideration of $10.

Another exception is to the admission of the final account of the administrator of Samuel Bryant. The defendant had testified that, according to his recollection, the heirs of Samuel Bryant received in all about $20. To contradict him plaintiff introduced the final account showing that each heir received about $20.

The jury returned the following verdict:

1. Did the defendant A. C. Bryant, by agreement with C. F. Bryant made before the sale, purchase the Samuel Bryant land at the administrator's sale for himself and C. F. Bryant, as alleged in the complaint? Answer: "Yes."

2. Did the defendant, under such agreement and purchase, agree with plaintiff that the land described in the complaint should be allotted to the plaintiff and a deed made therefor when the balance of the debt on the whole tract was paid by the plaintiff? Answer: "No, according to first issue, plaintiff getting equal share with defendant."

3. How much of said debt now remains unpaid? Answer: "$225, and interest now due."

Judgment for the plaintiff, and defendant appealed.

Winston & Matthews for plaintiff.

E. R. Tyler, Gillam & Davenport, Murray Allen and G. E. Midyette for defendant.

WALKER, J., after stating the case: We need consider only one question, and that is the competency of the letter addressed by Mrs. Futrell to the plaintiff's son. This, in our opinion, was hearsay, and therefore should not have been admitted. It was also prejudicial. The letter was not competent because Mrs. Futrell was not sworn as a witness and was not even present at the trial. It was written to the plaintiff's son, a third party, and was, therefore, a transaction between persons who were not parties to the cause or interested therein, and who were not witnesses. Plaintiff says it was corroborative of him, as he had stated that he had received letters from her or that this letter had been so received. But the fact that a letter or letters had been received from her proved nothing, and therefore needed no corroboration. It is further contended that because it was at least corroborative the defendant should have placed his objection on that ground alone. But that rule applies when the objection is to the effect of the evidence, or when it may tend to prove two or more things, and is competent only as to one of them, but not where the evidence is wholly incompetent, as here, it being hearsay. The objection is that in that form it is competent for no purpose. It is saturated with hearsay, and was *res inter alios acta.* It should have been excluded.

But plaintiff contends that it was not prejudicial, as it proved nothing that could affect the defendant injuriously in the trial of the case. We can well see how, in one phase of the testimony, it may have been used with fatal effect against the defendant. The controversy was a close one, and it required little to turn the scales in favor of either side. This letter may have been the deciding factor. The plaintiff contended that it was competent, when it was introduced, because it tended to corroborate his version of the facts. If this be so, it was surely hurtful to the defendant. But we do not think that we could better demonstrate its harmfulness than by quoting from the plaintiff's own brief what is so forcefully said about the matter, which we now do: "The deed (referred to in the letter) is not offered as a link in a chain of title. It is offered to prove the contention of the plaintiff and in corroboration of it. The defendant denied the parol agreement, and denied that there was such a deed in furtherance of it. The introduction of the paper-writing, not as title, but in corroboration, follows as a matter of course. It is a very strong circumstance in support of plaintiff. Defendant had denied the parol agreement *in toto.* He also denied that there was such a deed. The presentation of the deed put that matter at rest. The plaintiff does not claim that he owns the land under that deed; he might safely do so, but that was not his agreement. The deed is a strong circumstance tending to show that his contention is the true contention."

If this deed was a strong piece of evidence for the plaintiff, he tried to strengthen it by showing that while the deed recites that he paid the purchase money, it was really paid by the defendant, and as plaintiff had an equitable interest in the land and the parties were dealing with each other on that basis, the deed was made to him, and that there was no other reason why it should have been so made, if defendant owned the entire interest and had paid the purchase money. It is evident from the record that the letter explaining the transaction in regard to the deed had great weight in deciding the issue against the defendant. Besides, the plaintiff's contention was, as he so testified, that the dower of Mrs. Futrell was to be bought at the price of $150, and a deed therefor taken to him. That defendant had negotiated the trade and advanced the purchase money, which was to be a part of the price to be paid by them jointly for the land. In this view of the plaintiff's claim and testimony, it was incompetent to show any facts, by hearsay, which tended to support the plaintiff's theory. The court admitted the testimony for this purpose, and we must assume, under the circumstances, that it was permitted to be used in that way. It was, at least, given such a trend in the court below as to be calculated to affect the result unfavorably to the defendant, and therefore may have seriously prejudiced him. *Patton v. Porter,* 48 N. C., 539.

The deed, without the letter to help give it point and relevancy, would have been of little or no value. The two were so allied to each other that the object of introducing the deed, and its bearing upon the case, would not appear until the letter was considered. They could not well be severed or disassociated as pieces of evidence, because the one explained the other. We do not see how such evidence could have been otherwise than prejudicial. It may be that it was slight, and that the jury should attach little importance to it, but we cannot safely say, as contended by the plaintiff, that it was harmless. As said by *Pearson, C. J.,* in *McLenan v. Chisholm,* 64 N. C., 323, at p. 324: "There is no telling how far the defendant's case was affected by this error. Where there is error its *immateriality* must clearly appear on the face of the record in order to warrant this Court in treating it as surplusage." *Johnson v. R. R.,* 140 N. C., 581, at p. 587. The other exceptions need not be considered. If defendant wished to set up laches or the statute of limitations, or any other matter in defense, he should so plead and tender the proper issues. We do not mean to say that laches or the statute will avail him, for that will depend upon the evidence.

We feel constrained by the ruling of the court in respect to the incompetent evidence to grant another trial to the defendant.

New trial.

GULF REFINING COMPANY v. J. T. MCKERNAN, BUILDING INSPECTOR, ETC.

(Filed 17 September, 1919.)

Appeal and Error — Findings — Remanding Case — Gasoline—Distributing Plants — Municipal Corporations—Cities and Towns—Ordinances—Rehearings.

Upon suit to compel the proper officer of an incorporated town to issue a permit to the plaintiff to erect an oil or gasoline distributing plant for the handling of large quantities thereof at a certain place therein, the defendant denied his legal authority, or if otherwise, that the issuance of the permit was a matter of his discretion; and further, that the erection of the plant was in violation of certain ordinances of the town: *Held*, error for the lower court to issue the *mandamus* upon his opinion that the defendant was not vested with discretionary authority, and decline to pass upon the validity of the ordinances; and the case is remanded for him to make further findings of facts with reference to the ordinances, and whether the issuance of the permit will violate them or any of them.

ACTION tried before *Connor, J.*, at July Term, 1919, of LEE.

This was an application for a *mandamus* to compel the chief of the fire department and *ex officio* building inspector of Sanford to issue a permit for the erection of an oil or gasoline distributing plant in the said town, at the corner of the Southern Railway right of way and Washington Street, a fully itemized description of which accompanied the plaintiff's written application.

In his answer the defendant, among certain denials of the complaint and other matters alleged in defense, says:

1. That as the defendant is advised and believes he has no legal authority to issue a permit such as is desired by the plaintiff, and if the defendant has such authority that the issuance of such permit is within his sound discretion, in the exercise of which the court will not interfere.

2. That the plaintiff, through its authorized agent, A. W. Teague, made application to the board of aldermen for the town of Sanford, N. C., for permission to erect such buildings and structures desired for storing and distributing great quantities of gasoline, oil, and other

highly dangerous and inflammable substances, at a regular meeting of the said board held on 1 July, 1919, and the said board of aldermen, in the exercise of its discretion, refused and declined to grant permission for the erection of the buildings and structures referred to.

3. That the storing of gasoline and oil and other highly dangerous and inflammable material nearer than 1,000 feet from any residence or in any residential section of the town of Sanford, N. C., is contrary to the ordinances of the said town.

4. That the erection or construction of buildings or other structures designed for the purpose of storing large quantities of gasoline, oil, and other highly dangerous and inflammable substances is in violation of the ordinances of the said town.

5. That the issuance of the said permit referred to and requested by the plaintiff is a matter exclusively within the sound discretion and judgment of the proper authorities of the town of Sanford, N. C., in the exercise of inherent governmental functions pursuant to the Constitution and statutory authority conferred by ch. 380, Private Laws 1915.

It appeared that after this proceeding was commenced the board of aldermen of Sanford passed two ordinances forbidding the erection of such an oil and gasoline plant as that which is described by the plaintiff except under certain restrictions, "within 1,000 feet of any dwelling, or in any residential section within the corporate limits of the town of Sanford," and any violation of either of the two ordinances is made a misdemeanor with penalty prescribed. There was already an ordinance forbidding the location of such a plant in the town within 100 feet of any dwelling house.

The court was of the opinion, and so adjudged, that the defendant is not vested with any discretion to refuse the permit to the plaintiff, and it declined to decide the question as to the validity of the ordinance passed before the suit was commenced or the two ordinances which were passed in July, 1919, and above described, and directed the *mandamus* to issue. Defendant excepted and appealed.

Hoyle & Hoyle for plaintiff.
Williams & Williams for defendant.

WALKER, J., after stating the facts: We deem it impossible, or at least inadvisable, to decide upon the merits of this case and to render such a judgment as will finally settle it without a finding of the facts with reference to the three ordinances, and especially as to whether the proposed structures if placed upon the lot in Sanford, which has been described, will violate the provisions of the said ordinances, or any one of them, and if so, which one of them. We therefore remand the case with instructions to find the facts as indicated above, to the end that the case may be fully considered.

This Court has the power to remand a case so that there may be a fuller finding of facts by the judge, and in order that the appeal may be more intelligently considered in every view of it. *Straus v. Beardsley*, 79 N. C., 59; *Gatewood v. Burns*, 99 N. C., 357; *Holly v. Holly*, 96 N. C., 229. This case is far too important in itself and in its results for us to decide it except upon the fullest showing as to the facts. The defendant pleaded the new ordinances, and their effect upon the case should be passed upon.

The case is therefore remanded with directions to find the facts relating to the two ordinances, and as to the other question, whether the plant proposed to be erected by the plaintiff will conform to their provisions, stating the location of the plant and its surroundings, and such other matters as will enable the court to determine whether the ordinances are applicable, and if so, to what extent. Our opinion as to the law is withheld until all the facts are before us.

We do not agree with the learned judge that the ordinances were not before him for his consideration and a determination as to whether or not they would affect the result, and if so, in what way and to what extent, but the facts should have been found. In this respect there was error. The judge will reconsider the case upon the new facts found by him and enter such judgment as he may deem to be proper. The case may be further heard at this term if so desired by the parties.

Defendant will pay the costs of this appeal to this time.

Error, and remanded with directions.

REBECCA JERNIGAN v. BLACKMAN JERNIGAN.

(Filed 17 September, 1919.)

1. **Judgments—Regular—Course and Practice of Court—Motions—Statutes.**

   In a suit to set aside certain deeds alleged to be void and to declare plaintiff the owner of the title to lands, a judgment by default is regularly entered when the defendant has failed to file an answer within the statutory time, and the summons has been duly served. Rev., sec. 556(4).

2. **Judgments—Motions—Neglect—Notice—Statutes—One Year—Computation of Time.**

   The defendant in an action is fixed with notice, at the time of service of summons, that a judgment by default may be taken against him for failure to answer in the due course and practice of the courts, but not of the fact that such judgment has been entered until the day of its rendition. Hence a motion to set aside such judgment for mistake, surprise, and excusable neglect is made within the statutory time if within one year from the date such judgment was rendered (Rev., sec. 513), the provisions of Rev., sec. 573, as to judgments, etc., relating to the first day of the term of court at which they were rendered, not applying in such cases.

APPEAL by defendant from *Kerr, J.*, at February Term, 1919, of HARNETT.

E. F. Young and R. W. Winston for plaintiff.
C. L. Guy and Clifford & Townsend for defendant.

CLARK, C. J. This was a proceeding to set aside a judgment by default final on the ground of irregularity and excusable neglect. The action was to declare certain deeds void and the plaintiff the owner of the lands in fee simple. The complaint was duly verified and filed 3 July, 1916, and judgment by default final entered at September Term, no answer having been filed. The summons was issued returnable to the May Term, and was served on 11 May, 1916. The judgment by default final was regular. Rev., 556(4); *Junge v. MacKnight,* 137 N. C., 285; *Stelges v. Simmons,* 170 N. C., 44; *Lee v. McCracken, ib.,* 576. Had it been irregular the court could have set it aside at any time. *Becton v. Dunn,* 137 N. C., 559. The court declined also to set it aside on the ground of excusable neglect because it held that the motion was not made within one year as provided by Rev., 513.

Section 513 provides: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

The judgment here sought to be set aside was rendered on 17 September, 1916, at the term of Harnett court which began on 3 September. The motion to set aside for excusable neglect was entered on 4 September, 1917, at the term which began 2 September. The court was of opinion that as judgments related back to the first day of the term that the motion entered 4 September, 1917, at September Term, which began 2 September, was not within the one year after the entry of a judgment rendered at September Term, 1916, which term began 3 September.

The defendant's counsel with some pertinency suggests that if the judgment entered 16 September, 1916, related back to 3 September, the first day of that term, then the motion which was entered on 4 September, 1917, should relate back also to 2 September, the first day of that term, and that the fiction that all proceedings should date back to the first day of the term should apply to the motion to set aside the judgment equally as to the judgment itself.

But we do not think that Rev., 573, which provides that "All judgments rendered in any county by the Superior Court thereof during a term of the court, and docketed during the same term or within ten days thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term" applies to motions to set aside judgments for excusable neglect.

Revisal, 573, originated in Rule XVIII of the Supreme Court, 63 N. C., 676, in 1869, to prevent an unseemly contest as to priority of judgments and of docketing where the judgments were all obtained at the same term. *McKinney v. Street,* 165 N. C., 515; *Fowle v. McLean,* 168 N. C., 540; *Hardware Co. v. Holt,* 173 N. C., 311. To prevent such scramble where the defendants might be in failing circumstances and the priority of judgment by one day, or even by hours or minutes, though taken at the same term, might give priority of lien, this rule was adopted and was afterwards made statutory. That section is entitled "Judgments—Docketed and indexed—all of same term as of first day."

Originally when a judgment was taken it could not be set aside on motion after the adjournment of the term for excusable neglect or mistake when the judgment was taken in regular course. *Moore v. Hinnant,* 90 N. C., 164; 23 Cyc., 902. The remedy on allegation of fraud in taking the judgment is still by independent action. *Carter v. Rountree,* 109 N. C., 29, and citations thereto in Anno. Ed. To prevent such defect of justice Rev., 513, was enacted. This provides that such motion to "relieve a party from judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect" may be made "at any time within one year after notice thereof." This statute does not deal with the priority of lien, as contemplated by Rev., 573, acquired by the docketing of a judgment.

Parties to an action are fixed with notice of all judgments and orders taken in a cause during the term of the court (*University v. Lassiter,* 83 N. C., 38, often cited), but they cannot have notice of the judgment until it is rendered, and there is no provision of the law nor any legal fiction which provides that notice of the judgment taken shall relate back to the first day of the term.

Revisal, 513, provides that the motion to set aside this judgment can be made at any time within one year "after notice thereof." The defendant was fixed with notice of this judgment, having been served with summons, from the day it was taken, i. e., on 16 September. In all other cases (as for instance when he has been made a party to a pending action without notice) he has one year from *actual* notice. *McLean v.*

McLean, 84 N. C., 370. The motion to set aside was entered on 4 September, 1917, and being within one year of the entry of judgment was within the time allowed by the statute.

The merits of the motion have not been passed upon and are not before us. The order refusing the motion must be set aside that the merits of the motion may be passed upon.

Reversed.

LUZANIA MITCHELL v. MARY MELTON ET ALS.

(Filed 17 September, 1919.)

Appeal and Error—Transcript—Docket—Dismiss—Motions—Rules of Court.

The certificate of the clerk of the Superior Court is necessary to complete appellee's motion to dismiss (Rule 17) for appellant's failure to file his transcript on appeal within seven days before entering upon the call of the docket to which it belongs (Rule 5); and where the appellee has failed to comply with Rule 17 until after the appellant has docketed his transcript in compliance with Rule 5, his motion will be denied and the hearing continued under Rule 5.

APPEAL by defendants from *Guion, J.*, from May Term, 1919, of BERTIE.

Winston & Matthews for plaintiff.
W. R. Johnson and R. C. Bridger for defendants.

CLARK, C. J. The defendants not having filed the transcript on appeal on 2 September, seven days before entering upon the call of the docket of the district to which it belonged, as required by Rule 5, the plaintiff filed his motion under Rule 17 to docket and dismiss. But this motion was defective because it was not accompanied by the certificate of the clerk of the court as required by said rule.

The defendants thereupon filed said transcript on the next day, 3 September. The clerk's certificate to complete the appellee's motion to dismiss was filed thereafter on 5 September.

When the appellant fails to docket his appeal at the required time the appellee can move to dismiss at that time or subsequently during the term, provided he does so before the appellant cures the defect by docketing the transcript (*Benedict v. Jones*, 131 N. C., 473; *Vivian v. Mitchell*, 144 N. C., 472), and for that purpose we have held that the appellee can file his motion even in vacation, or on a day when the court is not in session. *Craddock v. Barnes*, 140 N. C., 428; *Vivian v. Mitchell, supra.*

But if the appellant files his record before such motion is made by the appellee, if at the term at which the appeal should be taken, it is too late then for the appellee to move to dismiss. This has been held in numerous cases. *Laney v. Mackay,* 144 N. C., 630; *Foy v. Gray,* 148 N. C., 436; *Gupton v. Sledge,* 161 N. C., 214.

In this case the appellee moved in time, but he did not comply with Rule 17 because of the absence of the certificate of the clerk below which is the indispensable basis of the motion to dismiss. It was therefore no motion. In the meantime, before the appellee perfected his motion by filing such certificate, the appellant cured his laches by docketing the transcript on 4 September.

The case was therefore regularly on docket before the appellee filed an efficient motion, but the case being docketed less than seven days before the call of the district it stands continued under Rule 5.

The motion to dismiss came too late.

Motion denied.

E. W. WINBORNE v. THE INTERSTATE COOPERAGE COMPANY.

(Filed 24 September, 1919.)

1. **Employer and Employee—Master and Servant—Duty of Master—Tools and Appliances—Defective Tools—Negligence.**

In order to recover damages for a personal injury resulting to an employee in using simple, every-day tools upon allegation that the employer had failed to furnish him proper tools and appliances for the work the former was required to do in the course of his employment, it must be shown, among other things, that the injury resulted from a lack of such proper tools, or by reason of defects therein, which the employer is required to remedy, in the proper and reasonable discharge of his duties, and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur.

2. **Same—Evidence—Nonsuit—Trials.**

The plaintiff was employed by the defendant to take down old boxcars to save the iron therein, frequently requiring cutting the iron bolts from the rods, the plaintiff at first using his own tools, but to do the work faster required other tools, and an assistant, which was granted, the tools being supplied by a hardware store, upon defendant's order, of plaintiff's own selection. At the time of the injury the plaintiff directed his assistant to strike a cold chisel he was holding, with the poll of an ax belonging to the company, not enumerated by him in the list of tools he required, but found by him near the place and which he had used for several days without examining it, and the ax flew off the helve causing the injury complained of to the plaintiff's foot: *Held,* insufficient evidence that the defendant had failed in his duty to furnish the plaintiff with proper tools and appliances, etc., and a motion for judgment as of nonsuit should have been granted: *Held further*, that the plaintiff's testimony when recalled, to the effect generally that he had asked for more tools and could not get them, when considered in connection with his former entire statement and evidence, showing specifically that he had the tools sufficient and proper for the work, will not affect the result.

ACTION tried before *Devin, J.*, and a jury, at April Term, 1919, of BEAUFORT.

The action is to recover damages for physical injury, caused by alleged negligence of defendant in not supplying plaintiff, an employee, with sufficient and proper tools with which to do his work. On denial of liability and plea of contributory negligence, there was verdict for plaintiff and assessing damages at $550.

Judgment on the verdict for plaintiff and defendant appealed, assigning for error, chiefly, the refusal of the motion for nonsuit.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J. There were facts in evidence tending to show that in August, 1917, plaintiff, employed by defendant for the purpose, was engaged in taking down some cars, situate on a logging road a few miles out from Belhaven, N. C.; that they were old cars, and it being desirable to save as much of the iron as possible in shape for further use, it was not infrequently required to cut the iron bolts from the rods used in bracing the woodwork of the cars and serving to hold the frames together; that plaintiff, a carpenter of skill and experience, 63 or 64 years of age, having the ordinary tools for his work, which he was to use as required on the present job, had taken down one or two of the cars, when finding that he was not making satisfactory progress for lack of a helper and adequate tools for the undertaking, applied for an assistant and proper tools and was authorized to procure the help needed, and was given further tools which he claimed were fit and proper, to wit, a cold chisel and a hack-saw frame and blades for cutting iron and a Stilson wrench, according to defendants, this last being the only tool plaintiff had specifically mentioned, and that the hardware store was directed to let him have the tools he selected, and the cold chisel, hack-saw, frame and blades were both new and fitted for the work. That after he with his assistant, one Wallace, had been engaged on the work for two or three days, while plaintiff was holding the cold chisel in place to cut off an iron bolt, plaintiff directed Wallace to strike the same with an ax of the company which plaintiff says he had found out at the cars, and as Wallace struck with the ax it came off the handle, the eye of the ax striking plaintiff's foot and making a bruise thereon which resulted in painful and protracted injury from which he still suffers. A perusal of our decisions on the subject will show that in order for liability to attach, in case of simple, every-day tools, it must appear, among other things, that the injury has resulted from a lack of such tools or defects therein which the employer is required to remedy, in the proper and reasonable discharge of his duties, and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur. Thus, in the recent case of *Rogerson v. Hontz*, 174 N. C., 27, where plaintiff was seriously injured by reason of a defective cant hook which he was using to load and place heavy saw logs, and of which defect the employer was fully aware, the Court, in setting aside an order of nonsuit in the case, and in reference to the rule of liability, said:

"On the facts as now presented the evidence tends to show that this cant hook was an implement suitable to the work and which the employer should supply; that while simple in itself it was designed, by leverage, to give the workman more power; that he was engaged in loading and unloading heavy logs from cars, rough work, and where he was frequently liable to be in position that if the hook slipped its hold or the handle broke severe injuries were not improbable, and, applying the principles of the case referred to and others of like import, the issue must be referred to the jury on the question whether the tool was defective; was such defect known to the employer, and was it of a kind which threatened substantial injury in its use?"

Again, in another very similar case in the same volume, *King v. R. R.*, 174 N. C., 39, stating the principle as it generally prevails in such cases, it was again said:

"In *Rogerson v. Hontz,* at the present term, the Court has held, in approving the decision of *Wright v. Thompson*, 171 N. C., 88, and other cases, that where an employee was injured by reason of defective tools supplied him, the employer was not necessarily relieved of all responsibility merely because the tools were of simple structure, but in case there was negligent default in the respects suggested on the part of the employer, and the defect was of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it; and it was further shown that the employer knew of such defect, or should have found it out under the duty of inspection ordinarily incumbent upon him in such cases, that under certain conditions liability might attach." And in cases of *Wright v. Thompson*, 171 N. C., 88; *Young v. Fiber Co.,* 159 N. C., 375; *Mincey v. R. R.*, 161 N. C., 467-471; *Reid v. Rees,* 155 N. C., 230; *Mercer v. R. R.*, 154 N. C., 399; *Cotton v. R. R.*, 149 N. C., 227, all of them, so far as examined, where recovery was sustained for lack of simple, ordinary tools or for defects therein, it was shown that the injury resulted from the breach of duty reasonably incumbent on the employer under all the facts of the case and that the defect was one from which some substantial injury was not unlikely to occur. Accordingly, a further examination of our authorities will disclose that where these elements or either of them are lacking, though there may have been some technical breach of duty, no actionable wrong will be imputed. Thus, in *Dunn v. R. R.*, 151 N. C., 313, a case almost exactly similar to that before us, an employee was injured by a hammer flying off the helve, which he had been using several hours, giving him every opportunity to observe its condition, relief was denied. And in the more recent case of *Morris v. R. R.*, 171 N. C., 533, a plaintiff, an employee of defendant company, was using a heavy hammer, driving spikes into crossties to hold the rails secure, he was standing in an uneven position with one foot on a soft or shelving pile of dirt; the hammer, from continuous use, had become very slick on the head and the employee had been promised a new one. In driving a spike in the position indicated the hammer slipped off, jerking the employee down and causing a severe and painful injury to his back for which he sued. In sustaining an order for nonsuit in the case, the Chief Justice thus clearly states the distinction to which we are adverting:

"The whole subject has been very recently reviewed in *Wright v. Thompson*, 171 N. C., 88, with full citation of authorities. In that case, in repairing a dredge, whose crane and dipper had become loosened, the plaintiff, in driving in the drift-pin to fasten them, struck it with a hammer, when a piece of steel from the defective and broken drift-pin flew off and struck the plaintiff in his eye and put it out. We set aside the nonsuit because it was shown that the drift-pin furnished the plaintiff had been broken off and had remained so at least thirty days, and the plaintiff had notified the foreman of its defective condition. Injury might reasonably have been expected from such cause. That was certainly a very different case from the present. Here the tool was a hammer, and it could not be anticipated that on striking the spike to drive it into the crosstie the hammer would slip, nor that by its going two inches further the plaintiff's back would be sprained. His standing upon a loose mound of earth also certainly was a mere incident, and could not have been expected to cause injury." On a proper application of the principles applied in these cases and the facts appearing in the record we are of opinion that no recovery can be had by plaintiff, and defendant's motion for nonsuit should have been allowed. True, plaintiff, when called back to the stand, says in general terms, "That he couldn't get no tools and went over there two or three times and begged for tools," but in his principal examination he states very clearly that he had and was using a cold chisel, a hack-saw, both frame and blades, all new, and that these were the tools desirable and suitable for the work in which he was engaged. As to the "bolt clipper," while this seems to be a tool recognized and sold in the trade, we do not find that such a tool was in use in this kind of work, nor do we recall that any witness had even seen one large enough to cut three-quarter bolts, the size the plaintiff was dealing with in this instance. And in reference to the ax that Wallace was using at the time to drive the cold chisel, that plaintiff had never made any complaint that he needed a different tool for the purpose, and if he had, the injury was not on account of any difference that might have existed between a hammer and an ax but because the ax had not been made tight and secure on the handle, a defect that might just as likely have developed had he been using a hammer. He had found the ax there and had been using it for several days and had every opportunity to put the ax in better shape and failed to do it.

On consideration of his entire statement and the other uncontradicted testimony you are forced to the conclusion that plaintiff's injuries are attributable to his own default or that of his colaborer in not keeping his axe in safer condition. As he says himself, "I hadn't looked at the ax; I suppose I didn't take time."

This will be certified that the verdict and judgment be set aside and defendant's motion for nonsuit be allowed.

Reversed.

JAMES D. PARKER ET ALS. v. COMMISSIONERS OF JOHNSTON COUNTY.

(Filed 24 September, 1919.)

Constitutional Law—Stock Law—Repealing Statutes—Funds on Hand—Distribution—County Funds—Counties.

Where by legislative enactment a county has been placed under a stock law, the statute directing that stock law fences shall be sold and the proceeds derived from the sale and any stock law funds on hand shall be returned to the general fund of the county, is mandatory and also constitutional.

WALKER, J., dissenting.

APPEAL by plaintiffs from *Kerr, J.*, at April Term, 1919, of JOHNSTON.

S. S. Holt and Parker & Parker for plaintiffs.
Abell & Ward for defendant.

CLARK, C. J. This is an action, upon facts agreed, to compel the commissioners of Johnston County to distribute and refund the surplus of the fund which had been collected in said county to construct and maintain a stock law fence. The whole of Johnston County having been placed under the stock law by legislative enactment, the necessity for the continuance of said fence had ceased. Thereupon by sec. 4, ch. 466, Public-Local Laws 1915, it was provided: "The board of commissioners of Johnston County is hereby authorized to sell for cash, at public or private sale, all stock law fences in the county, and the proceeds derived from the sale of the same, together with any stock law funds now on hand, shall be returned to the general fund of said county." This statute is clearly mandatory.

The plaintiffs claim that this statute is unconstitutional and seek to have the fund distributed to the landowners from whom it has been collected as a special assessment. The surplus consists of something over $4,000 accumulated in the several years beginning in 1912, and probably $1,500 from the sale of the fence made in compliance with the statute. As to the latter, it is clearly county property as much so as proceeds from the sale of an abandoned courthouse or a discarded bridge or any other kind of property. As to the accumulated excess the bounds of the stock law have been changed from time to time, and, besides, some of those paying the assessment have died and their estates have been settled and others have moved away. If the commissioners should have desired to refund the surplus to those who paid it in, this would have been difficult.

The cost of calculating and dividing the sums to refund to each of those who from 1912 down to this time have paid assessments for the stock law fence would be considerable. Almost the only benefit that would accrue to any one would be the commissions to the tax collectors for again collecting the same sum for necessary county purposes.

But the only question really before us is whether there is any restriction in the Constitution forbidding the General Assembly to direct that the surplus of a fund in the county treasury collected for any purpose shall be used by the county for any necessary expenses. We know of no such provision. Suppose this fund had been raised by a special tax authorized by the Legislature to build a jail or a courthouse or for any other purpose, is there any constitutional restriction which forbids the Legislature from directing afterwards that the surplus which may happen instead of being returned to the taxpayers shall be used by the county for any other necessary purpose. In the absence of a statute, officers have no power to refund taxes though illegally collected. 27 A. & E., 756.

It is true that this particular fund was collected from the real estate owners for the purpose of building a stock law fence. But there are other taxes which have been collected from certain specified sources and in like manner to be applied to special purposes. For instance, the license tax derived from automobiles is appropriated to the highway commission for the purpose of building and maintaining public roads. Should there be any unused excess of such fund by reason of funds derived from the Federal Government, or from the general property tax or otherwise, would not the Legislature have power to direct its application to general purposes?

There is also a fertilizer tax which has been appropriated to the use of the Agricultural Department and 25 cents per bale on all cotton ginned in the State to provide for a warehouse system. If for any reason there should be an excess in these funds, or if the warehouse system were abandoned, the Legislature could certainly direct that the unused surplus of these funds should be applied to other purposes, and it would not be necessary on constitutional grounds to divide up this remnant of the fund and to return dividends therefrom to the companies paying the fertilizer tax or to the farmers paying the gin tax.

There have been many other instances of taxes raised from special sources and appropriated by the act creating them to special purposes, among them the retail liquor license which went to the schools. Would it be necessary to return the surplus, if any, of such fund to the barkeepers? Whenever there is an excess, which rarely happens, it is in the power of the sovereign either to redistribute this surplus to the parties paying it in or (as probably has always been done) direct that it shall be applied to other purposes. Whether the fund has been accumulated in the State Treasury or in the county treasury, it is in the discretion of the General Assembly whether that in the State Treasury shall be applied to other State purposes and whether the funds accumulated in the county treasury shall be applied to other necessary county purposes.

It is true that the stock law funds were collected by an assessment upon real estate only, but whether it was collected from real estate or from all property or from property and polls or from license and other taxes is an immaterial circumstance which cannot affect the power of the General Assembly to direct that any fund in the county treasury unused shall be applied to general county purposes. If so applied, it will go to schools, roads and bridges and all other necessary expenses of the county. If it were returned to the real estate owners who are among the largest taxpayers the amount returned would have to be again assessed and collected. The difference between the small dividend refunded to each of the 2,600 taxpayers in this case and the amount which would be again collected out of them to make good the deficit thereby caused in the county treasury would be almost infinitesimal.

In Connor and Cheshire on the Constitution, 282, it is said: "Where a statute authorizing the levy of a tax beyond the constitutional limit, for a special purpose, is *infra vires*, the taxes collected beyond the requirement of the special purpose may be turned into the general fund and used for general purposes."

In *Long v. Comrs.*, 76 N. C., 280, the Court says: "We know of no statute nor any rule of law, public or private, which prevents the county commissioners from applying a tax raised professedly for one purpose to any other legitimate purpose."

In *Williams v. Comrs.*, 119 N. C., 520, the Court held that where a statute authorized the levy of a tax for a lawful purpose but beyond the constitutional limit the taxes collected beyond the requirements of the special purpose may be turned into the general fund and used for general purposes, but where the act will authorize the levy partly for a legal purpose and partly for an illegal purpose, it is *ultra vires* and no part of the levy can be collected. The Court was unanimous as to the application of such taxes after collection. Though there was dissent on another point, there was no difference on the view expressed in the latter opinion that "if the levy had been authorized for two purposes only, and a surplus had been raised, it would have gone into the county treasury to meet current expenses without any further authorization of the act. *Long v. Comrs.*, 76 N. C., 275."

The plaintiff relies upon *Comrs. v. Comrs.*, 92 N. C., 180, where Lenoir and Greene counties having united to erect a stock law fence around a district lying partly in both, and Greene complained that owing to a difference in the assessment of real estate in the two counties an excessive amount had been paid by the taxpayers therein, it was adjudged that the disparity should be corrected by reassessment, and that the surplus wrongfully collected in Greene should be reimbursed by Lenoir, such fund to be held in trust by the former for the reimbursement of those who had overpaid their share.

But in that case there was no statute, as in this, authorizing the fence to be sold and the proceeds thereof and any surplus funds still in hand to be used for general purposes. It was an equalization statute between the contributors to the fund in the two counties.

We find in the Constitution nothing denying to the General Assembly the power to direct that the surplus of this fund in the county treasury (which seems already to have lain there idle for four and a half years, since this act was passed in 1915, at a loss in interest equal to more than a fourth of the fund) shall be used for general county purposes.

In *Parker v. Comrs.*, 104 N. C., 166, it is held that the requirement in the Constitution, Art. V, sec. 7, that "Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and that it shall be applied to no other," has no application to taxes levied by the county authorities for county purposes.

In *R. R. v. Comrs.,* 148 N. C., 247, the Court said: "We do not concur with the suggestion that the commissioners have the power to levy and collect a tax for a specific purpose and apply any part of it to another purpose," giving as a reason that the taxpayer was entitled to an order enjoining the appropriation of any part of the excess over interest on the bonds to any other purpose, for it could be held to meet the interest for the following year or for a sinking fund. This clearly does not apply to cases where the purpose for which the sum is raised having been completely attained, there is a surplus left in the treasury which must either be applied to general county purposes or be returned to the taxpayers to be collected again for such general purposes, which is avoided by retaining such surplus for that use.

When a tax or assessment is paid into the public treasury of the State or a county, if the purpose expressed in the act is fully accomplished, leaving an unexpended surplus, the State or county has control of it, and bad faith cannot be imputed by the courts to the Legislature in authorizing such surplus to be "covered into the general fund."

Affirmed.

WALKER, J., dissenting: It is a mistake to suppose that this stock fence fund was collected under a levy upon all the taxpayers of Johnston County. It was collected from only a part of them. If this law is enforced it will, both in theory and in practice, be simply permitting one part of the people to be solely taxed for the benefit of another, and the cases cited in support of the opinion do not sustain such a proposition, or anything like it, but a very different one. It would be clearly violative of the principle declared in the recent case of *Comrs. of Johnston Co. v. B. R. Lacy, State Treasurer,* 174 N. C., 141. *Justice Hoke,* in his opinion delivered for the Court, says: "It is not within the legislative power to tax one community or local taxing district for the exclusive benefit of another —a principle which has been directly approved in several recent decisions of this Court, and is one very generally accepted," citing *Keith v. Lockhart,* 171 N. C., 451; *Faison v. Comrs.,* 171 N. C., 411; *Harper v. Comrs.,* 133 N. C., 106; *Comrs. Prince George v. Comrs. Laurel,* 70 Md., 443; *Lumber Co. v. Township of Springfield,* 92 Mich., 277; *People of Salem, supra,* citing *Lexington v. McQuillan's Heirs,* 39 Ky., 513; Cooley on Taxation (3d Ed.), 420; Judson on Taxation, sec. 254; 37 Cyc., 749. He adopts what *Judge Cooley* says upon the subject, as follows: "The taxing district through which the tax is to be apportioned must be the district which is to be benefited by its collection and expenditure. The district for the apportionment of the State tax is the State, for the county tax the county, and so on. Subordinate districts may be created for convenience, but the principle is general, and in all subordinate districts the rule must be the same." Cooley on Taxation, *supra.* And also the general principle, as stated by another standard text-writer, was approved. "The constitutional requirement of uniformity of taxation forbids the imposition of a tax on one municipality or part of the State for the purpose of benefiting or raising money for another." 37 Cyc., *supra.* He further says, and what he says completely covers this case as with a blanket: "It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Art. I, sec. 17, which forbids that any person shall be disseized of his freehold, liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land."

It would be useless to pursue the discussion further, so apt and pointed are the extracts we have made from that well-considered opinion of this Court. Here the tax was a special one, levied upon the inhabitants of a stock law district in Johnston County, in and near Smithfield Township, for the purpose of building a fence to surround said district, the same having been created under a special statute and authority also given thereby to levy the tax. It was not a tax levied under legislative authority extending to the entire county of Johnston. If the excess of the tax levy can be given to the other inhabitants of the county for their benefit, it follows that one section of the county, in this indirect way, can be taxed for the benefit of another. Admitting that the surplus of a general tax can be thus constitutionally added to the general funds or revenues of the county, it does not follow that the surplus of a special tax can be thus applied to general county purposes. Every citizen should be made to contribute his full share to the particular burden of taxation resting upon him and those similarly situated, but the State cannot, under our Constitution, or under that of any other well regulated system of government, exact more of the taxpayer. There should always be, as near as may be, an equal distribution of benefit and burden. This may be adjusted, it is true, and it has been so held, upon some equitable principle of apportionment applicable alike to all (8 Cyc., pp. 1071 and 1132), for example, by districts or area or by lineal feet, as in the case of local assessments, but in whatever way it is done it must not amount to the taking of one taxpayer's property and giving it to another, who contributed nothing to the tax. It had might as well be accomplished directly as indirectly. Circumlocution or indirection is no justification of it. In principle and in effect, it is the same to the taxpayer as if the State should reach into his pocket and, against his consent, hand over his money to his neighbor as a gratuity. It makes little difference to the loser whether it is taken in one way or the other, if he is wrongfully or inequitably deprived of it. If the surplus of the tax collected in this stock law district cannot be returned to its taxpayers they should, at least, have the benefit of it in their own district or locality. There is no more reason for giving it to those outside the district than for giving any surplus of county taxation to this special district, which we said in the *Johnston case, supra,* could not be done.

LEWIS LIPSITZ v. WILLIAM R. SMITH ET ALS.

(Filed 24 September, 1919.)

1. **Mortgages—Sales—Deceased Mortgagor.**

The sale, in pursuance of the power contained in a mortgage made by husband and wife of the latter's lands, after the death of the principal mortgagor, the wife, is properly made.

2. **Same—Devisees—Parties.**

Where the mortgagee has sold the lands of the wife according to a power of sale therein, after the death of the wife, the devisees of the wife are the proper and usually sufficient parties in a suit involving the distribution of the surplus.

3. **Mortgages — Sales — Surplus Funds — Deceased Mortgagor—Devisees—Suits—Interpleader.**

Where the mortgagee of lands sells the same under the power of sale contained in the instrument, after the death of the mortgagor, and has a surplus fund in his hands for distribution among her devisees, among whom there is a *bona fide* dispute as to the amount each should receive, the mortgagee may maintain a suit to protect himself in paying over the surplus to the distributees until the correct proportion is determined by the court, in the nature of an original bill of interpleader under the old system, showing that he has the fund in his possession and his readiness to pay it into court as a jurisdictional or essential averment, and the court may make proper orders for its care and supervision.

4. **Appeal and Error — Fragmentary Appeal — Mortgages — Sales—Interpleader—Stake-holder—Orders—Inconsistent Positions.**

Where the mortgagee has a surplus fund in his hands for distribution among the devisees of the deceased mortgagor, among whom is a *bona fide* dispute as to their distributive share, and the mortgagor has brought

suit to protect himself in paying over the amount in his hands, his appeal from an order of court directing him either to pay the same into court or to give bond for the protection of the claimants is a fragmentary one and improvidently taken; and further, his position in objecting to the order is antagonistic to the basic facts required to sustain his suit, which he will not be allowed to question.

ACTION in the nature of a bill of interpleader, heard on motion to require plaintiff to pay the money into court, before *Connor, J.*, at May Term, 1919, of BERTIE.

There was judgment directing the plaintiff to pay this fund into court or give a solvent bond to secure the same, etc. Plaintiff excepted and appealed.

Gillam & Davenport for plaintiff.
Winston & Matthews and Martin & Winborne for defendants.

HOKE, J. On the hearing it was made to appear that in 1915 William R. Smith and his wife Mary, being indebted to the plaintiff, in order to secure said indebtedness, executed a mortgage on the land of Mary Smith, his wife, with power of sale. And soon thereafter said Mary Smith died leaving a last will and testament, devising her lands in unequal proportion to her husband, her three daughters, Hattie Hardy, Mariah Hardy, and Joe Alfred Hardy, now intermarried with her codefendant, Lonnie Perry. That said indebtedness being due and unpaid as per contract, plaintiff, under the power of sale contained in said mortgage, sold said land for the price of $2,030, executed a deed for same to the purchaser, applied the proceeds to payment of the amount due on said debt and costs, etc., amounting to $284.45, leaving a balance in his hands of $1,745.55, which plaintiff now holds for distribution among the parties justly entitled to same, and having no other interest in said fund.

That William R. Smith, the husband, has acquired the interest on said land devised to two of the daughters, Hattie and Mariah Hardy, and as between William R. Smith and the other daughter, Joe Alfred Hardy Perry, there is a *bona fide* dispute as to how much of said fund in plaintiff's hands is due to either of said parties, the nature of the dispute being fully set forth in the pleadings, that he cannot with safety pay out this fund to the respective claimants until the correct proportion is determined, etc.

On these facts chiefly relevant we are of opinion that the order directing the payment of money into court was clearly within the power of his Honor, and that the same has been providently made.

So far as now appears and under our decisions applicable this power of sale contained in the mortgage has been properly exercised, notwithstanding the death of the principal mortgagor. *Carter v. Slocomb*, 122 N. C., 475.

The devisees under the will as holders of the equity of redemption therein are the proper and usually the sufficient parties in a suit involving a distribution of the surplus. *Snow v. Warwick Institute*, 17 R. I., p. 66; 27 Cyc., pp. 1498-99, 1792; 2 Jones on Mortgages, secs. 1687-1929-31.

And the proceedings showing that plaintiff is the holder and in possession of the fund to which he makes no claim, and that defendants are in a *bona fide* controversy as to their respective interests, the facts would seem to present a clear case for an original bill of interpleader under the old system and now disposed of by civil action. In such case not only is it within the court's power to make all proper orders for the care and supervision of the fund, but the plaintiff in such a bill must have the fund in his possession and allege his readiness to pay the money into court as a jurisdictional or essential averment. *Fox v. Cline* 85 N. C., 174-76; *Martin, Admr. v. Maberry et al.*, 16 N. C., 169; *Look v. McCahill,* 106 Mich., 108; *Walker et al. v. Aldrich et al.* (*Williams v. Walker*), 2 Richardson's Equity, p. 291; *Ammendale Institute v. Anderson,* 71 Md., 128; Pomeroy's Equity, sec. 59; 23 Cyc., 23.

This being true, we are of opinion further that no appeal lies from the order made in this case, the same being interlocutory in its nature and no substantial right of appellant being affected. *Blackwell v. McCain,* 105 N. C., 460; *Warren v. Stancill,* 117 N. C., 112; *Sutton v. Schonwald,* 80 N. C., 20; 2 Beach Modern Equity, sec. 924.

As said in the last citation, it is ordinarily true that "A decree that money be paid into court or that property be delivered to a receiver or that property held in trust shall be delivered to a new trustee appointed by the court for preserving the property pending litigation is interlocutory merely, and no appeal lies from it."

The plaintiff, having sought the aid of the court for his own protection in making disposition of a fund among several claimants, is required as stated to allege as an essential fact that he has the fund in possession and is ready and willing to pay the same into court or do whatever the court may order concerning it. In no event should he be allowed to maintain a position inconsistent with or directly antagonizing the basic facts of his own suit or question orders which the court may make in furtherance of his own application. *Brown v. Chemical Co.*, 165 N. C., 421; *R. R. v. McCarthy*, 96 U. S., 258; *First National Bank v. Dovetail,* 143 Ind., 534-538.

On the record, defendants' motion to dismiss plaintiff's appeal must be allowed and it is so ordered.

Appeal Dismissed.

H. R. RAGAN v. A. J. STEPHENS.

(Filed 24 September, 1919.)

Usury—Forfeiture—Interest—Statutes.

Where an usurious rate of interest on money has been paid by the borrower of money, the statutory penalty is double the amount of the usury, but where it is only charged, and not collected, the statute eliminates the usury and forfeits the interest on the amount of the loan. Rev., sec. 1951.

APPEAL by plaintiff from *Kerr, J.*, at March Term, 1919, of CHATHAM.

This is an action on three notes, one for $903 being the only one as to which any question is raised by the appeal.

The defendant pleaded usury, and the jury found that $100 of the $903 note is usurious.

The defendant has paid nothing to the plaintiff.

His Honor rendered judgment in favor of the plaintiff for $903 without interest, subject to a credit of $200, being double the amount of the usury charged in the note, and the plaintiff excepted and appealed.

W. D. Siler and J. S. Manning attorneys for plaintiff.
A. C. Ray and H. E. Norris attorneys for defendant.

ALLEN, J. The statute relating to usury (Rev., sec. 1951) makes a clear distinction between money charged and money paid on a usurious transaction.

As to the first, the penalty is the elimination of the usury and the forfeiture of the interest, and as to the second, when usurious interest is actually paid, the additional penalty of recovery of double the amount of the usury.

This is not only the plain language of the statute but it is the construction placed upon it in several of our decisions.

In *Rushing v. Bivens*, 132 N. C., 273, the Court says: "We think that before the plaintiff can maintain the action he must pay the usury in money or money's worth. He has done neither. He has paid nothing. It is well settled that the penalty is not incurred by the *charging* of usurious interest; it is by the *taking* the usury that the party incurs the penalty, and that no action lies therefor until it is paid. *Godfrey v. Leigh*, 28 N. C., 390; *Stedman v. Bland*, 26 N. C., 296. The renewal of the note to Griffin falls very far short of the payment of the original debt. If the plaintiff had given in payment and discharge the note of a third person, it would have been a good payment. *Pritchard v. Meekins*, 98 N. C., 244. The plaintiff may never pay the original notes."

And again, in *Riley v. Sears,* 154 N. C., 521, "While we hold that the notes sued on are void because based entirely on a usurious consideration, we think that on the pleadings the demand by the receiver for double the amount of the usurious interest should be disallowed. Both our statute and authoritative interpretations of it are to the effect that 'usury must be paid in money or money's worth before an action can be maintained therefor,' and the renewal of a note, given for usury, does not amount to such payment. *Rushing v. Bivens,* 132 N. C., 273."

It follows, therefore, as no money has been paid that the $100 of usury must be taken from the note and that the plaintiff is entitled to recover the balance ($803) without interest.

The judgment will be modified in accordance with this opinion.

Modified. Costs to be divided.

W. H. HEARNE v. M. E. PERRY ET ALS.

(Filed 24 September, 1919.)

Contracts — Deeds and Conveyances — Timber—Period for Cutting—Commencement—Breach Enforcement.

Where a contract for the cutting of timber allows a certain period of time in which the timber may be cut, etc., and provides that the time therefor shall commence after allowing a reasonable time for the grantee to finish cutting on his then location: *Held,* the provision as to the time within which the grantee shall commence to cut the timber is a material and enforceable one, and the grantee may not maintain his action to enforce his contract when it appears that he cut the timber upon other lands after he had finished cutting upon the lands allowed by the contract, and that he made no move to cut the timber upon the defendant's lands until eighteen months after the contract sued on was executed.

APPEAL by plaintiff from *Kerr, J.,* at December Special Term, 1918, of CHATHAM.

This is an action to recover damages for breach of contract in refusing to allow the plaintiff to cut and remove certain timber.

The contract was executed on 18 April, 1914. It conveyed certain timber for $850, of which $50 was to be paid in cash, which was done, and the balance at a certain sum per thousand feet as manufactured, "with full right and privilege for and during the period of two years and six months from the date of commencing sawing the timber on the above described land, provided the party of the second part begins the same within a reasonable time and moves his mill to said land as soon as he finishes his present location; and it is further agreed by the parties of the first part that the party of the second part will have a right to place his mill on said lands for the manufacture of said timber at one suitable place."

It was further provided in the contract: "It is the intention of this deed to convey the timber as above described on the condition that the party of the second part will comply with all the agreements and make the payments as above set forth, and in the event of said faithful performance this conveyance is to be in full force, otherwise to be null and void."

The plaintiff admitted that at the time the contract was made his mill was on his own land cutting timber and that he finished the work on this land within three or four weeks after the contract was made; that he then moved the mill to what is known as the Womble land, which, according to his evidence, was three-fourths of a mile from the land of the defendant, and according to the evidence of the defendant, a mile and a half distant; that he has never moved or attempted to move his mill to the land of the defendant, and that he did not go to the land of the defendant or offer to cut the timber under the contract until October, 1915, eighteen months after the execution of the contract.

At the conclusion of the evidence his Honor entered judgment of nonsuit, holding that the plaintiff was not entitled to recover because of his failure to perform the conditions of the contract, and the plaintiff excepted and appealed.

A. C. Ray and Siler & Barber attorneys for plaintiff.
Long & Bell attorneys for defendant.

ALLEN, J. The contract gives to the plaintiff two years and six months within which to cut and remove the timber, the time to commence "from the date of commencing sawing the timber," and it therefore became very material to have some stipulation which would prevent the plaintiff from postponing indefinitely the time when he would remove his mill to the land of the defendant and begin his work, and it was for this reason that it was made a provision of the contract that the plaintiff should begin "the same within a reasonable time and move his mill to said land as soon as he finished his present location."

This is the contract of the parties and the court cannot do otherwise than enforce it, and the plaintiff having admitted that he has not performed his part of the contract; that he has never attempted to move his mill to the land of the defendant; that he did not attempt to go from the place where he was then working to begin work under the contract, and that he made no move to cut the timber of the defendant until eighteen months after the contract was executed, he cannot maintain his action.

The controlling principle is stated in *Supply Co. v. Roofing Co.*, 160 N. C., 445, as follows:

"In *Ducker v. Cochran,* 92 N. C., 597-600, *Chief Justice Smith,* delivering the opinion, said: 'The proposition is too plain to need any reference to authority in its support, that a party to a contract cannot maintain an action against another for its breach without averring and proving performance of his own antecedent obligations or some legal excuse for nonperformance, or, if the stipulations are concurrent, his readiness and ability to perform.' This statement has been quoted with approval in *Corinthian Lodge v. Smith,* 147 N. C., 246; *Tussey v. Owen,* 139 N. C., 457-461, and the principle is one very generally recognized in our decisions. *Wildes v. Nelson,* 154 N. C., 590; *Hughes v. Knott,* 140 N. C., 550."

There is no error in the judgment of nonsuit.

Affirmed.

HETTIE BARHAM ET ALS. v. MATT HOLLAND ET ALS.

(Filed 24 September, 1919.)

Descent and Distribution—Heirs at Law—Presumptions—Instructions—Appeal and Error—Reversible Error.

The law presumes that the estate of a deceased person descends to his heirs at law upon his death, and an instruction that the burden of proof is on them to show intestacy is reversible error.

SPECIAL proceedings for partition of land instituted before clerk, transferred to Superior Court on an issue of *sole seizin,* made by one of defendants, Lucy Holland, etc., and tried before *Kerr, J.*, and a jury at February Term, 1919, of HARNETT.

There was verdict for defendant on the issue. Judgment, and plaintiffs excepted and appealed.

J. R. Baggett and Clifford & Townsend for plaintiffs.

E. F. Young and F. T. Dupree for defendant.

HOKE, J. There were facts in evidence tending to show that the property in controversy belonged to one Lem Holland; that in 1882 he left the State, going to South Carolina, and that no message had been received from him by any of his family or others "since about a year or two after he left the State, and the reputation in the family was that he was dead," and plaintiffs and defendants are his heirs at law, brothers and sisters of the deceased or their children; that, just before leaving, Lem Holland, the owner, placed the property in possession of his brother, Jim Holland, to hold the same for the owner, and not long after Jim died, leaving his widow Lucy and several of their children in possession, and they or some of them had continued to live on the place till institution of the suit.

There was testimony for defendant tending to show that Lem Holland placed his brother Jim and his wife on the place as owners, and that since Jim's death his widow, Lucy, who sets up the plea of *sole seizin*, had continued to occupy and possess the property and that such possession was adverse and in the assertion of ownership, that she was the sole owner, as alleged in her plea. On the issues thus raised his Honor, among other things, charged the jury:

"The burden, then, is upon the plaintiffs to satisfy you by the evidence, and by its greater weight, that Lem Holland is dead, and that he died seized and possessed of this piece of land; (2) that he died intestate, that is to say, that he did not leave a will and give this land to anybody else; (3) that the parties to this action are his heirs at law; that is, that they are the ones who are entitled to his property in the event that he did die owning this property, and that he did die without any will conveying it to somebody else." And further: "In order that you should answer the issue 'Yes,' it is essential, as I said, that you should find all of these facts to exist from the evidence, by its greater weight, as I have defined greater weight to you, and if you fail so to find, you will answer the issue 'No.'" There is no presumption which requires that before an heir at law can recover as for lands descended he should show that his ancestor died intestate. On the contrary, the presumption is the other way. Speaking to the subject in 9 R. C. L., p. 9, sec. 3, the author states the prevailing position as follows: "The heir is favored in law. He never takes by the act or intention of the testator. His right is paramount to and independent of the will, and no intention of the testator is necessary to its enjoyment. He needs no argument or construction showing intention in his favor to support his claim. They belong to the party claiming under the will and in opposition to him. To cut off either the heir or next of kin, therefore, the estate must be devised or bequeathed, expressly or by necessary implication, to some other person, and whoever claims against the laws of descent must show a sufficient written title, for an estate in fee is presumed to descend, on the death of the ancestor, in pursuance of the laws of inheritance, unless the descent is shown to have been interrupted by a devise."

The cases referred to are in support of the text, among others Sipman's Appeal, 30 Pa. St., 180; *Graham v. Graham*, 23 W. Va., 36, and our own decisions on the subject are in full recognition of the principle.

In re Hedgepeth, 150 N. C., 245; *Cox v. Lumber Co.*, 124 N. C., 78; *Floyd v. Herring*, 64 N. C., 409.

As shown in some of the cases cited for defendant, *Blue v. Ritter*, 118 N. C., 580, etc., there is, at times, a presumption against partial intestacy, that is, when it is established that an ancestor has made a will it is presumed, in the first instance, that he intended to make disposition of all of his property, but on the facts of this record the presumption is in favor of lands descended, and there is no burden on the heir at law to show that there was no will.

For the error indicated there must be a new trial of the cause, and it is so ordered.

New trial.

IN RE WILL OF MISSOURI A. PARHAM.

(Filed 24 September, 1919.)

1. Wills—Codicils—Probate—Letters.

By duly executed will testatrix devised her house to her two sons and on the following day wrote her attorney, the draftsman, she did not remember his reading this item to her, that she wanted her sons to have the house divided to suit them, etc. Upon admitting these several papers to probate in his order the clerk stated the paper-writing purporting to be the will was exhibited and duly proven by the subscribing witnesses, naming the attesting witnesses to the will and those by whom the letters were separately proven as a holograph will: *Held*, a sufficient recognition of the letters as codicils and a probate thereof, and the words of the certificate, "duly proven," carried the legal presumption that everything was properly done.

2. Limitation of Actions—Wills—Codicils—Probate.

Codicils to a will may not be caveated more than seven years after the will with the codicils have been admitted to probate before the clerk. Rev., sec. 3155.

APPEAL by Luther Parham from *Connor, J.*, at Chambers, 31 January, 1919; from VANCE.

This is a controversy submitted without action upon facts agreed for the construction of the will of Missouri A. Parham. She executed the will on 28 April, 1902, and the next day wrote to the draftsman of the will the following letter:

"April 29, 1902.

"CAPTAIN SHAW:—I do not recollect hearing you read it in the will, about the house. I want Locket and Luther to have my house and let them divide it as they please. I want you to put it in the will for

Locket's wife to have his part her lifetime if they do not have any children. I was afraid that you did not put it in the will about the house, and I could not go to sleep. Please send me receipt for the five dollars. I will pay you the other. Yours respectfully,

MISSOURI A. PARHAM."

And later, the following undated letter.

"CAPTAIN:—I could not get down there last summer. Let the will stand until I come down. If I die before I get there, give my house to Luther; it is too small to divide. MISSOURI A. PARHAM."

Both letters were produced before the clerk by Captain Shaw, proofs taken and probate made as below; and the will and letters were recorded by the clerk on 17 March, 1903, promptly after the death of the testatrix, and Locket Parham qualified as executor thereof and settled up the estate, and the land was divided up agreeable to the terms of the will as modified by the provisions in the said two letters probated as codicils. Luther Parham received the dwelling as part of his share according to the second codicil, modifying the first codicil.

On 13 January, 1919, the widow of Locket Parham filed a petition before the clerk reciting: "It appears from an inspection of the said will and codicils, together with the probate of the same, that the affidavits of the witnesses to the codicils is incorporated in the probate but that the codicils are not expressly referred to in the adjudication of probate by the clerk, which petitioner believes was an oversight since the proofs and codicils are recorded. Yet it is contended that said codicils have not been probated. Your petitioner, by the death of her husband, derived an interest under the said codicils for the term of her life in that portion of the lands devised by the said will and codicils to her said husband, P. L. Parham," and asked the court to correct and formally adjudicate the probate of the said codicils.

On this motion, after the notice to Luther Parham, the clerk adjudged that "Due proof of the execution of both said letters was taken on 17 March, 1903, and that the same were admitted to record as parts of the will of said testatrix; the court doth now, for then, adjudge that they were duly proven and doth admit them to probate." The following were the proceedings and decree on said probate:

ORIGINAL PROBATE.

State of North Carolina—Vance County—ss.
In the Superior Court.

A paper-writing, purporting to be the last will and testament of Missouri A. Parham, deceased, is exhibited before me, the undersigned clerk of the Superior Court for said county, by Locket Parham, the executor therein mentioned, and the due execution thereof by the said Missouri A. Parham is proved by the oath and examination of J. T. Harris, W. B. Shaw, the subscribing witnesses thereto, who, being duly sworn, doth depose and say, and each for himself deposeth and saith, that he is a subscribing witness to the paper-writing now shown him purporting to be the last will and testament of Missouri A. Parham; that the said Missouri A. Parham, in the presence of this deponent, subscribed her name at the end of said paper-writing, now shown as aforesaid, and which bears date 28 April, 1902.

And the deponent further saith that the said Missouri A. Parham, the testator aforesaid, did, at the time of subscribing her name as aforesaid, declare the said paper-writing so subscribed by her and exhibited to be her last will and testament, and this deponent did thereupon subscribe his name at the end of said will as an attesting witness thereto, and at the request and in the presence of the said testator. And this deponent further saith that at the time when the said testator subscribed her name to the said will as aforesaid, and at the time of deponent's subscribing his name as an attesting witness thereto, as aforesaid, the said Missouri A. Parham was of sound mind and memory, of full age to execute a will, and was not under any restraint to the knowledge, information or belief of this deponent. And further these deponents say not.

W. B. SHAW. (Seal.)
J. T. HARRIS. (Seal.)

Severally sworn and subscribed, this 17 March, 1903, before me.

HENRY PERRY,
Clerk Superior Court.

Also two letters, one bearing date the 29th day of April, 1902, the other without date, both addressed to W. B. Shaw, who was the draftsman of her will and at her request the custodian thereof, said letters speak of changes in said will, and purport to be codicils to the same will of M. A. Parham, deceased, which said will is also exhibited in open court by Locket Parham, the executor therein named. And it is thereupon proved by the oath and examination of W. B. Shaw that he drew the said will, and subsequent thereto the said letters were received by him in sealed envelopes from the said Missouri A. Parham through a messenger, and the same were at once deposited and kept in his safe in the same package with the said will until offered in court with the said will; that when he drew the will the testatrix requested him to keep the said will until her death, which he did as aforesaid. The said will and letters were filed in his safe in an envelope, marked "The Will of Missouri A. Parham."

And it is further proved by the oath and examination of three competent and credible witnesses, to wit, J. A. Kelly, J. E. Burroughs, and L. W. Burroughs, that they were acquainted with the handwriting of the said Missouri A. Parham, and verily believe that the name of Missouri A. Parham subscribed to the said letters, and the said letters and every part thereof, is in the handwriting of the said Missouri A. Parham.

W. B. SHAW.
J. A. KELLY.
J. E. BURROUGHS.
L. W. BURROUGHS.

Sworn and subscribed to before me, this 17 March, 1903.

HENRY PERRY,
Clerk Superior Court.

ORDER FOR PROBATE OF WILL.

State of North Carolina—Vance County.
In the Superior Court—Before Henry Perry, Clerk.
In re Estate of Missouri A. Parham, Deceased.

A paper-writing purporting to be the last will and testament of Missouri A. Parham, deceased, is exhibited in open court for probate by Locket Parham, executor therein named; and the due execution thereof by the said Missouri A. Parham, deceased, is duly proved by the oath and examination of W. B. Shaw, J. T. Harris, J. A. Kelly, J. E. Burroughs, and L. W. Burroughs, subscribing witnesses thereto; and it is further shown to the satisfaction of the court by said witnesses that the said Missouri A. Parham was, at the time of making said will, of sound mind and memory, of full age to execute a will, and under no restraint to their knowledge, information or belief:

It is thereupon considered, adjudged, and decreed that said proof is sufficient and according to law and that said paper-writing is and contains the last will and testament of Missouri A. Parham, deceased. And on motion it is ordered that said will be admitted to probate and recorded in the Book of Wills of Vance County, and as such, filed as provided by law in the office of the clerk of Superior Court of said county.

It is further ordered that said Locket Parham be allowed to qualify as executor as provided by law and enter upon the discharge of the duties imposed by said trust.

Dated this 17 March, 1903.

HENRY PERRY,
Clerk of Superior Court.

On appeal the judge approved and affirmed the order and Luther E. Parham appealed on the ground:

1. That the clerk was without authority to probate said codicils now because the same and all the proofs were before the court at the time the will was admitted to probate in 1903, and the judgment then admitting the will to probate exhausted the jurisdiction of the clerk, and pleaded the statute of limitations of one year within which a judgment can be corrected for mistake or excusable neglect and the general bar of the statute of ten years.

2. That the proofs which appear in the record did not warrant a finding and adjudication that the letters were codicils to said will.

3. That the second codicil revokes the first.

T. T. Hicks for appellee.
Andrew J. Harris and Thomas M. Pittman for appellant.

CLARK, C. J. Upon examination of the probate made 17 March, 1902, we think the clerk and the judge below were correct in their adjudication that "due proof of the execution of both said letters was taken 17 March, 1903, and that the same were admitted to the record as parts of the will of said testatrix."

It is therefore unnecessary to discuss the first exception as to whether they could have been admitted to probate *nunc pro tunc.*

When the will and two letters were produced before the clerk on 17 March, 1903, he took proofs of the execution of the will and separate proofs of the two codicils and adjudged that they constituted the will and recorded all three together in the book of wills, and the lands were divided on petition of the parties, Luther taking the house according to the second codicil and an equal number of the acres of land, though section 6 of the will proper gave the house to Locket and Luther jointly.

At the death of Locket Parham, 26 January, 1918, his wife claimed her life estate under the codicil, he having no children. Luther claimed that the letters were no part of the will and had not been probated as such and that the land became his, while Locket's wife contended that the letters had been probated and recorded and treated and acted upon as parts of the will, and she began this proceeding because of Luther's contention that the probate did not refer to the codicil.

We think that her prayer that the clerk should "amend the probate and make it refer to the codicil" was unnecessary, but the judgment rendered was proper "on the facts proven or admitted." *Elliott v. Brady,* 172 N. C., 830.

The clerk's adjudication 17 March, 1903, says "Will." He adjudicates that the execution thereof is duly proved by the oath and examination of W. B. Shaw and J. T. Harris (witnesses to the will proper) and J. A. Kelly, J. E. Burroughs and L. W. Burroughs (witnesses to the codicils). This was a sufficient recognition of the codicils and a probate thereof. *In re Will of Deyton,* 177 N. C., 495. And they were then recorded by the clerk with the will. The words "duly proven" carry with them a legal presumption that everything was properly done. *Lumber Co. v. Branch,* 158 N. C., 255.

The clerk's adjudication of 28 January, 1919, that they were part of the will was saying no more than had been said on 17 March, 1903.

It is not necessary therefore to discuss the jurisdiction of the clerk to amend the probate or to probate the codicils *nunc pro tunc.* We do not think the exception that the second codicil revoked the first requires discussion. The second codicil, written several months after the first, was a request to "let the will stand" as modified by the first codicil, for she makes no reference to the first letter or codicil except that she modifies it in the second letter by giving the whole of the house to Luther Parham, which indicates the extent to which she wished to modify her previous disposition of her property.

It was not open to the respondent to caveat the codicils, if duly proven in 1903, for he has not only filed no caveat to the will or the codicils, but more than seven years have elapsed since they were probated. Rev., 3155; *In re Dupree's Will,* 163 N. C., 256. The word "will" in the clerk's probate includes codicils. Rev., 2831, sec. 9. It is there referable to the word when used in a statute, but it therefore applies to legal proceedings and in all cases where a contrary intent does not appear.

We concur in the judgment of his Honor that the letters set out in the record have been duly probated and recorded as codicils to the last will and testament of Missouri A. Parham, and that "by virtue of the codicil dated 29 April, 1902, the said Rosa E. Parham is the owner of the tract of land described as the share of Locket Parham in the lands of Missouri Parham for the term of her natural life, and to the rents arising therefrom since the death of Locket Parham."

Affirmed.

S. I. DUDLEY ET ALS. v. R. O. JEFFRESS.

(Filed 24 September, 1919.)

1. **Deeds and Conveyances—Lands—Adjoining Owners—Divisional Line—Establishment—Estoppel—Boundaries.**

When two tenants in common have a divisional line run by a surveyor and go upon the land with him and run and establish this line with the intent of making their deeds to the land in severalty, and so make the deed, and they deal with the land as their own with reference to this line the boundary so established will estop either of them from claiming a different one as being in accordance with their deeds.

2. Same—Privies—Purchasers—Knowledge.

Where the original owners of land are estopped to claim, according to their deeds, a different dividing line from the one they have established as dividing their adjoining lands, their grantees are in privity with them and likewise estopped when they acquire the lands with knowledge of the line so established.

APPEAL by plaintiffs from *Daniels, J.*, at April Term, 1919, of PITT.

This was an action to establish a boundary line. On 8 December, 1904, the defendant and Dr. Moye agreed to partition a tract of land which they held as tenants in common—two-thirds to defendant and one-third to Dr. Moye, and employed J. D. Cox to survey the land for partition. They were with the surveyor and the division line was run by him with their approval, and was marked at the time, through the cleared land by a fence and in the woodland by chopped trees and well defined surveyor's marks to Tar River, and the deed was made at that time. It further appears from the record that from the date of the survey Dr. Moye occupied only the land lying to the east thereof and the defendant occupied and cultivated the land to the west of this division line. Dr. Moye conveyed the part which he then held in severalty to Ada M. Cherry and husband in January, 1906, who recognized this division line. They conveyed in October, 1908, to the plaintiff, who went into possession of said land, claiming only up to the division line between Jeffress and Moore as marked by the dividing fence and the chopped trees. When the plaintiff purchased said land he had actual knowledge of this boundary line to which Jeffress and Moye and the grantee of the latter had occupied. He made no other claim prior to June, 1916, when Harding, surveyor, suggested to him that if he desired to put his lands on the market for sale it would be wise to have the lands surveyed and platted according to the courses and distances contained in the deed. According to that survey he would obtain the *locus in quo*, but to do so the line would not only take in land which the defendant had been all the time occupying, but would run through certain buildings which were on the defendant's side of the line, as it had been surveyed and marked on the ground by the surveyor when Moye and Jeffress were present, and agreeing upon the division. The jury found that the marked line was the true line, and the plaintiffs appealed.

F. C. Harding, L. W. Gaylord and Albion Dunn for plaintiffs.
Skinner & Whedbee for defendant.

CLARK, C. J. The sixth assignment of error is to the following charge of the court: "Now, our Court has held that ordinarily a surveyor in running the lines of a tract of land shall be governed by the description contained in the deed conveying it, but there are exceptions to that. One of the exceptions is this, that where, with a view to making a deed or a division, the parties go upon the land and have the line marked and surveyed, intending it to be the line and to be included in the deed, then the line so surveyed and marked prevails against the description in the deed where there is a difference between them."

This is in exact accordance with the holding of *Hoke, J.,* in *Clarke v. Alridge,* 162 N. C., 327, and numerous cases there cited. This case has been cited with approval since with full citation of authorities by *Brown, J.,* in *Allison v. Kenion,* 163 N. C., 586, and by *Walker, J.,* in *Lumber Co. v. Lumber Co.,* 169 N. C., 89. Also in *Lee v. Rowe,* 172 N. C., 846. In a still later case, *Millikin v. Sessoms,* 173 N. C., 723, it is said: "It is settled beyond controversy in this State that a line surveyed and marked out and agreed upon by the parties at the time of the execution of the deed will control the course and distance set out in the instrument. *Addington v. Jones,* 52 N. C., 582; *Safret v. Hartman,* 50 N. C., 185; *Williams v. Kivett,* 82 N. C., 111."

The plaintiffs, while conceding that this would apply as between the original parties, Moye and Jeffress, and their privies, contend that it is inequitable as to the plaintiffs, who are innocent purchasers for value. In this case Dudley, however, bought with notice that the line had been agreed upon and marked and that the parties and their assignees held up to said marked line and he holds subject to the same estoppel.

This is the chief point in the case, and the jury have found their verdict upon a proper instruction from the court as to the law. The other exceptions do not require discussion.

"Privy means a privity in estate—a property right acquired by contract or inheritance. Bigelow on Estoppel, 142," cited with approval in *Shew v. Call,* 119 N. C., 454.

"The term 'privity' denotes mutual or successive relationship to the same right of property." 6 Words and Phrases and the exhaustive citations and authorities there cited, pages 5606-5609. It is there held that privies are of three kinds—in blood, in law and in estate. A privy in estate is one who derives his title to the property in question by purchase. *Orthwein v. Thomas,* 127 Ill., 554; 4 L. R. A., 434; 11 Am. St., 159.

"Privity exists between two successive holders when the later takes under the earlier, as by descent or by will, grant, or voluntary transfer or possession." *Sherin v. Brackett,* 36 Minn., 152. "Privity implies succession. He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title and thus takes it with the burden attending it." *Boughton v. Harder*, 61 N. Y., Supp., 574.

The plaintiff Dudley having bought and taken the deed with knowledge that the line as claimed by the defendant had been settled and marked on the ground by a fence and a line of chopped trees to the river, and that the parties, since said partition, including those under whom he claims, had recognized and held up to that line, cannot go beyond that boundary by reason of any error of the parties in drawing the deed not in conformity to said line.

No error.

CHARLES S. WALLACE, PROTESTANT, v. L. I. MOORE, TRUSTEE, ENTERER.

(Filed 24 September, 1919.)

1. **Railroads—Charter—Statutes—Lands.**

A railroad company is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in its charter or arising to it under the general laws.

2. **Same.**

The Atlantic and North Carolina Railroad Company is not given any power to acquire and hold real estate for general purposes or otherwise except for the purpose of constructing and operating its railroad, restricted usually to a proper right of way and the necessary terminal facilities (ch. 136, Laws 1852); and this power is not enlarged under the general statutes. Rev., secs. 2566, 2567, subsecs. 2 and 3.

3. **State Lands—Railroads—Persons—Enterer—Trustee—Trusts.**

A railroad company having no power to acquire lands except that which is limited to railroad purposes, does not come within the intent and meaning of Rev., sec. 1692, permitting all persons who shall come within the State, etc., to enter and obtain grants for the State's vacant and unappropriated lands, either directly or through a trustee who has made the entry and obtained the grant solely for its use or enjoyment.

APPLICATION for an entry of land instituted by defendant in which there was protest by plaintiff on possession of said land claiming the same as owner. The ground of his claim being fully set forth in his written protest, duly filed in the proceedings; heard before *Daniels, J.*, at June Term, 1919, of CARTERET.

The facts pertinent to the case are sufficiently shown in the judgment of his Honor dismissing the cause, as follows:

This cause coming on to be heard before his Honor F. A. Daniels, judge, and a jury, counsel for protestant requested in open court that the enterer, L. I. Moore, as trustee, should disclose to the court in whose behalf he was trustee. Without ruling of the court, counsel for the enterer stated that the entry was made as trustee for the Atlantic and North Carolina Railroad Company, and for the purpose of protecting their property adjacent to the water, which they claim has been filled in. Thereupon the protestant denied that the property entered was filled-in property or that the entry was for the purpose of protecting the property now owned by the railroad company. The protestant moved to dismiss the entry upon the ground that same could not be made by a trustee in behalf of the railroad company. His Honor being of the opinion that the railroad company in the first instance could not make the entry, ruled that the entry could not be maintained by a trustee for the benefit of the railroad company. The court sustained the motion and dismissed the entry, to which the enterer excepted and appealed.

D. L. Ward and Luther Hamilton for protestant.
J. F. Duncan and Moore & Dunn for trustee and enterer.

HOKE, J. The position is very generally recognized here and elsewhere that a railroad corporation is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in the charter or arising to it under the general laws. *Cross v. R. R.*, 172 N. C., 119; *Case v. Kelly*, 133 U. S., 21; *Pacific R. R. v. Seely*, 45 Mo., 212; *Coe v. R. R.*, 10 Ohio State, 372; 1 Elliott on Rys., secs. 390-91-92, etc.; 22 R. C. L., p. 813, title, Railroads, sec. 66.

In the citation to Elliott, *supra*, the general principle is stated as follows:

"The rule is well established that a railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or it does not exist. It is, however, not necessary that the authority should be expressly conferred. It may be implied."

And in answer to the suggestion that the question is one that concerns the State alone, and may not avail as between the corporation and individuals, *Associate Justice Miller*, delivering the opinion in the case of *Case v. Kelly, supra:*

"We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

In the present case, a careful examination fails to disclose that the charter (ch. 136, Laws 1852) confers upon the A. & N. C. R. R. Co. any power to acquire and hold real estate for general purposes or otherwise except for the purposes of constructing and operating its road, restricted usually to a proper right of way and the necessary terminal facilities. In section 5 the power is given to acquire real estate by purchase, lease, etc., and the same is immediately restricted by the express limitation, "So far as shall be necessary for the purposes embraced within the scope, object and intent of this charter and no further," etc.

In section 25, conferring power to condemn land when same cannot be acquired by agreement, the same limitation appears, and in section 25 the right of way is limited to 100 feet on either side of the line of road as permanently located. Nor is the power in question in any way enlarged by the general law on the subject. (Rev., ch. 61, secs. 2566-2567, subsecs. 2 and 3). In the first named section it is enacted that the provisions of the general law shall apply and affect railroad charters unless the charter itself otherwise especially provides, but the powers thereby conferred in reference to locating real estate, as shown in the section that follows section 2567 and subsections, are in no wise different from the special charter containing substantially the same restrictions on that subject. Thus in subsection 2, as to donations, it is provided: "To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only." And in subsection 3, as to purchases: "To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation."

This being the law applicable and the proponent having instituted the proceedings for himself as trustee generally, and having avowed in open court that he was acting for the railroad and intended to hold as trustee for it, a trust that our statute appertaining to this subject would at once execute (*Cameron v. Hicks,* 141 N. C., 21; *Smith v. Proctor,* 139 N. C., 314), this cause should be properly dealt with as if the company itself was the actor in the proceedings and in accord with the authorities heretofore cited, and in the absence of any claim or suggestion that the land applied for is required for the purposes of the road, or that it comes within the powers and privileges as to realty contained in the charter or general laws, we concur in his Honor's view and approve the ruling that proponent is without right to proceed further.

It is contended for defendant that although the charter and general law applicable to railroads may not confer the power to acquire this property, it arises to the company by virtue of the very general terms of the statute authorizing the issuance of grants for the State lands (Rev., ch. 37, sec. 1692), to the effect that any citizen of this State and all persons who shall have come into this State with the *bona fide* intent of becoming citizens thereof shall have the right and privilege of making entries and obtaining grants for vacant and unappropriated lands. Although it is held that corporations are to be regarded as citizens under the statutes conferring jurisdiction on the Federal courts by reason of diversity of citizenship, they are not so considered within the meaning of the constitutional and statutory provisions guaranteeing the privileges and immunities of citizenship, nor do they come generally within this meaning of that term. *Orient Ins. Co. v. Daggs,* 172 U. S., 55-7; *Ins. Co. v. Commonwealth,* 5 Bush, 68 (Ky.). And while the word "person" is more usually held to extend to corporations, this may depend largely on the context and the extent and purpose of the particular law. 7 R. C. L., citing *Overland Cotton Mills v. People,* 32 Col., 263, and other cases. A perusal of the statute in question here will disclose that it applies primarily to natural persons, having general capacity to take and hold real estate, and if it extends to corporations at all, it is subject to the restrictions and limitations established by the charter or the general law.

There is no error, and the judgment dismissing the proceedings is Affirmed.

MRS. M. S. MOORE v. GREENVILLE BANKING AND TRUST COMPANY.

(Filed 24 September, 1919.)

1. **Husband and Wife — Lands — Entirety — Sale—Severalty—Intent—Conversion—Estates.**

Where the husband and wife own the title to lands in entirety and sell the same, and it is shown that they divided the proceeds with the intent of holding, and held the same, in severalty, the unity of the title is severed, and the husband's part thereof can be subjected to payment of the claims of his creditors. As to whether the fact of sale alone would have this effect, *quere?*

2. **Same—Fraud—Evidence—Trials.**

A husband and wife held the title to lands in entirety and sold the same and the husband divided the proceeds of the sale and deposited the same to his wife's credit in two banks. The wife claimed the ownership of both deposits, claiming that the purchase of the land was made from her separate estate, and by mistake of the draftsman it was conveyed to her husband and herself in entirety, and there was evidence tending to show that the husband had theretofore been perfectly solvent but at the time in question was insolvent, and that he had told his creditor, the defendant in the action, "that all his property was in his wife's name, and that he could whistle for his money," and there was other evidence of fraud: *Held*, evidence sufficient to sustain a verdict to the effect that the proceeds of the sale were held by them in severalty, and that the transaction as to the deposit in defendants' bank was in fraud of the rights of the creditor.

3. **Verdict—Interpretation—Evidence—Instructions.**

The verdict of the jury must be construed in the light of the evidence and of the charge.

4. **Appeal and Error—Assignments of Error—Error Specified.**

Assignments of error will not be considered on appeal when not properly taken by the appellant according to the rules of the Supreme Court concerning them.

5. **Husband and Wife — Lands—Entirety—Conversion—Fraud—Evidence—Appeal and Error—Estates.**

Where the determining questions in a suit by a creditor of the husband are, whether the proceeds of the sale of land formerly held by him and his wife in entirety were thereafter held in severalty and half thereof deposited in the defendant bank in the wife's name, in fraud of the defendant's right to offset the amount by that of the male defendant's note due and held by the defendant, testimony of the male defendant as to his partnership with a third person, or whether their grantee of the land had assumed the debt, without defendant's consent, or as to why the male plaintiff had not paid the note, is irrelevant and was properly excluded.

6. **Banks and Banking—Deposits—Offset—Actions—Fi. Fa.**

A bank may offset the amount due by its depositor from the amount of his deposit, or this may be pleaded as a counterclaim by the bank, in a suit against it to recover the deposit, as a bill or action in the nature of a *fi. fa.*

CLARK, C. J., concurring.

ACTION tried before *Guion, J.*, and a jury, at May Term, 1919, of PITT.

The action was brought by the feme plaintiff against the defendant to recover of it an alleged deposit of two thousand and ninety and 56-100 dollars, and to recover damages for refusal of defendant to honor plaintiff's check. (This last cause of action, however, has been abandoned.) The facts out of which this controversy arose may be briefly stated as follows:

Prior to the fall of 1915, plaintiff's husband, who is a party to this action, and W. L. Hall were doing a partnership business in the town of Greenville, and engaged in buying and selling farm products. The firm carried a banking account with defendant, and for the purpose of securing overdrafts executed to defendant company their note for two thousand dollars, appearing in the record. W. M. Moore signed this note as surety.

Thereafter said firm and the said W. M. Moore, as surety, became indebted to defendant bank in the sum of two thousand ninety and 56-100 dollars. The firm became financially distressed, failed, and refused to pay the note. Hall was absolutely insolvent; Moore refused to pay, stating "that all of his property was in his wife's name, and the bank could whistle for its money."

Thereupon the credit of the firm having been given upon the bona fide belief of the bank in Moore's solvency, the bank investigated Moore's financial condition. This investigation disclosed that Moore had had considerable property, the title to all of which had become vested in his wife, the plaintiff; it found that plaintiff and her husband were the joint owners of a valuable residential lot in the town of Greenville, which they had purchased in 1908, and which they sold in the fall of 1915 for $12,000 cash, six thousand dollars of which was deposited by W. M. Moore in the National Bank of Greenville in the name of the plaintiff, and the other six thousand dollars was deposited in the defendant bank by said W. M. Moore in the name of the plaintiff.

The bank, finding that Moore did not intend to pay his obligation as surety and otherwise, sought advice as to how it might protect itself from loss, and was advised that upon the voluntary conversion of said real estate into cash the estate by entirety was dissolved; that its common-law incidents no longer applied; that one-half of the purchase price received for said lot, to wit, six thousand dollars, became the sole property of W. M. Moore and liable for his debts; that Moore had no legal right to give the plaintiff all of the said purchase price and thereby defeat the payment of his joint and individual liability to the bank. Thereupon the bank, under date of 1 February, 1916, notified the plaintiff of her status at the bank, and of the indebtedness of her husband, and of his refusal to meet his obligation, and further notified her that in order to protect itself from loss it would charge her account with an amount sufficient to pay the indebtedness due by said W. M. Moore, the bank contending that the plaintiff knowingly permitted Moore to perpetrate a fraud upon the bank, and was a party thereto in so far as she accepted all of said purchase price received for said lot in furtherance of the plan of W. M. Moore to defeat his liability to the bank; and thereupon the bank charged the amount of said note and interest to said fund received by virtue of the sale of said lot as aforesaid, and the plaintiff was duly notified that the bank would not honor any check drawn on said account which reduced the amount of said account below the sum of two thousand ninety and 56-100 dollars. Upon receipt of this notice the plaintiff drew a check on defendant bank which it refused to pay, and which if it had paid would have reduced the balance in her name below the amount of defendant's claim; and thereupon the feme plaintiff brought this action to recover said deposit of the bank. Thereafter W. M. Moore, her husband, was made a party as appears in the record.

When the case was first heard there was a mistrial, and thereafter the trial judge rendered judgment in favor of the plaintiff upon the pleadings, from which judgment the defendant appealed. This Court, on the appeal, granted a new trial, and the case, upon the second hearing, having been heard upon its merits, the result was that the jury answered all of the issues against the plaintiff, finding by its verdict that the money in defendant bank was the sole property of W. M. Moore, and placed by him in plaintiff's name for the purpose of defrauding the bank. Plaintiff appealed.

F. G. James & Son and W. F. Evans for plaintiff.
Albion Dunn and Skinner & Whedbee for defendants.

WALKER, J., after stating the case: The case was before this Court at the Spring Term, 1917, and the decision below was reversed. It is reported in 173 N. C., at p. 180. A careful review of that opinion clearly shows that the governing principles of law involved in this litigation have already been passed upon by the Court favorably to the defendant. Especially is this so when we take into consideration the full force of the following excerpt from our opinion, found on the bottom of page 183: "In the present instance, as we have seen, the claim of defendant bank is against both the partnership and the individual members who endorsed its note as surety, and under the doctrine recognized and approved by these and like authorities (*supra*) on the subject, if the facts should be established as alleged and contended for by the defendant bank, the right of appropriation, to the extent required to satisfy the claim, would arise to the bank, and the defendant is, therefore, entitled, as stated, to have the questions determined on proper issues. And the principle is in no way affected by the fact that the deposit now stands in the name of the plaintiff, the bank having taken it in ignorance of the true conditions affecting its rights. If, as defendant avers, it was in fact and in truth the husband's property, and placed in the wife's name with the intent to defraud creditors, and the husband being insolvent, she was a volunteer, or if she participated in the fraudulent purpose in such case the attempted appropriation is voided by our statute to prevent fraudulent gifts and conveyances (Rev., secs. 960-962), and the question can, for the purpose of this defense, be considered and dealt with as if the deposit stood in the name of the husband, a course pursued with approval in *Citizens Bank v. Garnett,* 21 Kansas, 354, an apt authority for the disposition being made of the present appeal."

On the new trial below, issues submitted, with the annexed answers thereto of the jury, were as follows:

1. Is the defendant W. M. Moore indebted to the Greenville Banking and Trust Company, and if so, in what amount? Answer: "Yes, $1,748."

2. Was the property purchased of T. E. Hooker paid for with the individual funds of Mrs. M. S. Moore? Answer: "No."

3. Was W. M. Moore the owner of the money deposited in the defendant bank? Answer: "Yes."

4. Were the proceeds of the property sold to W. H. Long deposited in the Greenville Banking and Trust Company in the name of M. S. Moore for the fraudulent purpose of preventing the Greenville Banking and Trust Company from collecting the amount due and owing it by W. M. Moore? Answer: "Yes."

These issues seem to cover the questions which this Court directed to be submitted to the jury, and the answers thereto all seem to have been in favor of the defendant bank.

Whether the deed from Hooker and wife to Moore and wife creates a tenancy in common or an estate by the entirety, it would seem, under the facts, that a conversion of the estate took place, as it was intended that it should do so, upon the execution of the deed to Long. That there was an intention to convert the estate by the entirety into an estate in severalty is evidenced by the fact that the husband attempted to give all of his interest therein to the plaintiff, his wife.

We do not deem it necessary to consider or to decide whether the voluntary conversion of the land into money by the sale to W. H. Long, nothing more appearing, divested the proceeds of every attribute of an estate by the entirety simply by the conversion itself, because we are of the opinion that, by the very conduct of the parties, such a conversion and divestiture resulted, and it was manifestly so intended, as we will show, when the fund was divided into halves and deposited by the mutual consent of the parties, one-half thereof in the defendant bank and the other half in the National Bank of Greenville. Mrs. Moore asserts that the deed for the Hooker lot was bought with her own money, which was derived from other property owned by her in Grimesland. We will state this matter more at large and in substantially her own way. She admits, in her reply to the answer of the defendant, that for several years prior to 22 October, 1915, the Hooker lot was held in the name of the plaintiff and her husband, W. M. Moore, "by deed in the entirety," but that in fact it was bought and paid for with her individual money, and that when the deed was written it was, by inadvertence of the draftsman, conveyed to both husband and wife by the entirety, and that after the discovery of the same she and her husband agreed that it might be so held as appears in said deed, but for the real use and benefit of the plaintiff. That she sold the property to W. H. Long on 22 October, 1915, and that with her husband she joined in a deed conveying the same for twelve thousand dollars to him. She further admits that in payment for the said lot the purchaser, W. H. Long, did draw two checks, made payable to the order of the plaintiff, one in the sum of six thousand dollars, which was deposited in the National Bank of Greenville in the name of and to the credit of the plaintiff, and another check in the sum of six thousand dollars, made payable to her order and deposited in the name of and to the credit of the plaintiff in the defendant bank, and that the reason for so doing was to divide said deposit between the two banks in order that both might share in the benefit of the deposit of said fund equally, which was done at the request of one of the banks.

Now if it was the purpose to convert the land into money, which should be the sole property of Mrs. Moore, this would destroy the estate by the entirety, and it would thereby become an estate in severalty, or if this was to be so in form merely but not in fact, and the intention was that while the apparent title to the fund stood in the name of Mrs. Moore, the real title was to be in them severally, one-half to belong to each, this was a conversion also into an interest in severalty in the money or, in other words, a conversion of the land into money and a division into equal shares of the fund. If the latter was the agreement, and such a conversion could be accomplished by their consent, the husband's title to the half deposited in the defendant bank could not be concealed and covered up to defraud his creditors, he being then insolvent and not having other property sufficient and available to pay his then existing creditors. It seems to us that the jury have found this to be the truth of the matter and the real transaction, though in form it appears to be otherwise, and that Mrs. Moore owned the entire fund. And for the sake of discussion we may concede, without deciding, that when the conversion into money was made they could enter into an arrangement, in defiance of the husband's creditors, by which she should have it all.

Let us see, then, if the jury have sufficiently and conclusively decided that while Mrs. Moore was to take it all in form the other was the real purpose, and that her husband was to be the beneficial owner of the half which was deposited in the defendant bank subject to his check, and that the deposit in her name was a mere shift to deceive, circumvent and defraud creditors. They have said that the Hooker lot was not bought with the individual funds of Mrs. Moore, and that W. M. Moore was the owner of the funds deposited in the defendant bank, and not only is that true, they further say, but that the deposit was made in the name of his wife for the fraudulent purpose of preventing the defendant bank from collecting the amount of Moore's indebtedness to it. This effectually disposes of the idea that there could have been any "estate by the entirety" in the fund realized by the sale of the Hooker lot in Greenville, and, on the contrary, the jury find as a fact that the former estate by the entirety in the lot had, by the express agreement between the apparent owners thereof, been converted into an estate in severalty, as the idea is excluded thereby that it was understood that Mrs. Moore should be the sole owner of the fund.

The characteristics of the anomalous estate, which is denominated as one by the entirety, are well understood. Blackstone (Book 2, p. 182) defines this estate by these words: "If an estate in fee be given to a man and his wife they are neither properly joint tenants nor tenants in common; for husband and wife being considered one person in law they cannot take the estate by moities, but both are seized of the entirety *per tout et non per my,* the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor." Mordecai's Law Lectures (1907), p. 559. This Court has held that the husband is entitled to the income, increase or usufruct of the property. *Long v. Barnes,* 87 N. C., 329; *Simonton v. Cornelius,* 98 N. C., 437; *Bruce v. Nicholson,* 109 N. C., 204; *Bank v. Gornto,* 161 N. C., 341; *West v. R. R.,* 140 N. C., 620. The estate was predicated upon the fact that in law the husband and wife, though twain, are regarded as one—there being, in other words, a unity of person, which has been called the fifth unity of this estate, the others being of time, title, interest and possession, which also belonged to an estate by joint tenancy. When land is conveyed or devised to husband and wife, nothing else appearing, they take by the entirety, and upon the death of either the other takes the whole by the right of survivorship. 2 Bl., 182; *Topping v. Sadler,* 50 N. C., 357; Freeman on Cotenancy and Partition, sec. 64, and *Harrison v. Ray,* 108 N. C., 215, and the cases *supra,* beginning with *Long v. Barnes.* The statute (1784, ch. 204, sec. 5; Revisal of 1905, sec. 1579) abolishing the right of survivorship in joint tenancies does not apply to this estate. *Motley v. Whitemore,* 19 N. C., 537; *Todd v. Zachary,* 45 N. C., 286; *Woodford v. Higly,* 60 N. C., 234. One peculiarity incident to this estate is, that if an estate be given to A., B. and C. and A. and B. are man and wife, they, being one person, will take a half interest and C. will take the other half. This ancient absurdity seems to be the law in this State now. *Hampton v. Wheeler,* 99 N. C., 222. Another peculiarity of this estate is that neither husband nor wife can dispose of their interest or any part thereof without the assent of the other. The deed of either without the joinder of the other is void. *Gray v. Bailey,* 117 N. C., 439; 2 Blk., 182; *Ray v. Long,* 132 N. C., 891. Neither can such land be sold under execution, nor can the interest of either husband or wife be thus sold. *Bruce v. Nicholson,* 109 N. C., 202; *Gray v. Bailey, supra; Ray v. Long, supra.* Nor can one be barred by the statute of limitations unless the other be barred also. *Johnson v. Edwards,* 109 N. C., 466. The above rules apply to devises to man and wife (*Simonton v. Cornelius, supra*), and also to contracts to convey land to man and wife. *Stamper v. Stamper,* 121 N. C., 251. They likewise apply to a gift or devise to a man and his wife "during their natural lives." *Simonton v. Cornelius, supra.* Mordecai's Law Lectures (1907), pp. 559-560. In *Hairstone v. Glenn,* 120 N. C., 341, where money, the separate earnings of husband and wife, was deposited in a bank in their joint names, the husband stating to the cashier, in the presence and hearing of his wife, that it was their joint earnings and that he desired a certificate made out for the whole amount ($1,500) in their joint names, which was done, and the certificate delivered to the husband, the latter having stated that when either died he wanted the survivor of them to have the entire fund; the husband then died and his widow claimed but half of the fund: It was held that she was entitled to it, the question of survivorship and her right to the whole of the fund not being before the Court. That case, while very close to the question raised in this one, does not decide it, for the reason stated, that she did not claim the whole of the fund. The interest and control of the husband during the existence of the joint estate, or the joint lives of the two parties, is well illustrated in the recent decision of *Dorsey v. Kirkland,* 177 N. C., 520, known as "the flume case"; *Jones v. Smith,* 149 N. C., 317, and *Bank v. McEwan,* 160 N. C., 414, where the question of the respective interests and rights of the two parties is fully considered. In the flume case it is said, citing and quoting from *Bynum v. Wicker,* 141 N. C., 96: "This estate by entirety is an anomaly and it is perhaps an oversight that the Legislature had not changed it into a cotenancy, as has been done in so many States. This not having been done, it still possesses here the same properties and incidents as at common law, under which 'the fruits accruing during their joint lives would belong to the husband,' hence the husband could mortgage or convey it during the term of their joint lives, that is, the right to receive the rents and profits; but neither could encumber it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired." And in *Greenville v. Gornto,* 161 N. C., 342, a lease for ten years made by the husband was held to be valid, and the Court said concerning the nature of the estate and the rights and powers of the husband during the life of the wife: "As Brady and his wife held, not as tenants in common or joint tenants but by entireties, their rights must be determined by the rules of the common law, according to which the possession of the property during their joint lives vests in the husband, as it does when the wife is sole seized. Neither can convey during their joint lives so as to bind the other or defeat the right of the survivor to the whole estate. Subject to the limitation above named, the husband has the same rights in it which are incident to his own property. By the overwhelming weight of authority the husband has the right to lease the property so conveyed to him and his wife, which lease will be good against the wife during coveture and will fail only in the event of her surviving him." *Bynum v. Wicker, supra; Long v. Barnes, supra; Simonton v. Cornelius, supra,* and *Greenville v. Gornto, supra.* An interesting discussion of this "unity of person," as pertaining to the relation of husband wife, by *Justice Allen,* will be found in *Freeman v. Belfer,* 173 N. C., 581, where the authorities are collected and reviewed.

But this unity or entirety of the estate may be destroyed or dissolved by the joint acts of the parties, and the estate which was entire turned into a tenancy in common or into one in severalty, each taking separately a share thereof to be determined by them. The transaction may be of such a nature and the conveyance so worded that they will be decreed to hold as tenants in common and not by the entirety. *Eason v. Eason,* 159 N. C., 539; *Highsmith v. Page,* 158 N. C., 226; *Stalcup v. Stalcup,* 137 N. C., 305; *Speas v. Woodhouse,* 162 N. C., 66; *Isley v. Sellers,* 153 N. C., 374. Where it appears that no such estate as that by the entirety was intended, but it was the purpose that they should hold as tenants in common, it will be so adjudged, and in proper cases the instrument will be reformed to carry out the intention. *Highsmith v. Page, supra.* The intention appearing, a conveyance may be made to husband and wife as tenants in common; but otherwise they will take by the entirety, with right of survivorship. *Holloway v. Green,* 167 N. C., 91. A divorce *a vinculo,* as it destroys the unity, will convert the estate by entirety into one in common. *McKinnon v. Caulk,* 167 N. C., 411.

In this case it appears from the verdict of the jury that the parties had agreed to sever the unity existing between them as to the estate in this land when it was sold, and in pursuance of that understanding six thousand dollars of the fund, or one-half thereof, was deposited in a bank for the plaintiff, and in her name, and the other half in the defendant bank, also in her name, but really for the secret benefit of her husband, so that he could hold off the defendant as his creditor, and hinder the recovery of its claim, he being then in failing and embarrassing circumstances. There was ample evidence of this fact so found by the jury, for the husband checked upon the deposit and treated it as his own with the knowledge and consent of his wife, and while the cashier, Mr. C. S. Carr, was trying to effect a settlement or adjustment of Moore's account with the defendant bank, Mr. Moore, after manifesting some indifference, finally turned to him and said, "All my property stands in my wife's name and the bank will have to whistle for its money." His indebtedness at that time was $2,000 with interest. The jury have found that the debt is $1,748; that the property purchased from T. E. Hooker was not paid for with the individual funds of Mrs. Moore; that Mr. Moore was the actual owner of the fund deposited in the defendant bank, and that the deposit was made in the name of Mrs. Moore with the fraudulent purpose of preventing the defendant from recovering upon the note held by it against Mr. Moore. If there was evidence to support this verdict, and there is no error in the charge of the court or elsewhere in the case, we do not see why the defendant is not entitled to the judgment now being reviewed.

We will now consider briefly if there was any error in the charge or the rulings of the court at the trial. The charge was as clear-cut and as free from any error as it could possibly be, and the jury have found, evidently, when we read the verdict in the light of the evidence and the charge, as we should do, that the parties contributed equally to the purchase of the Hooker property, and that they agreed to divide the proceeds of its sale equally between them, the fund deposited with the defendant being Mr. Moore's half, though not credited on the books of the bank in his name. This was a transaction between husband and wife and a third person, the defendant, who was a creditor of the insolvent husband. There is evidence of facts and circumstances which give rise to a grave suspicion of fraud if they were established, and the jury have found upon them that there was an actual intent to defraud the defendant, and there is, therefore, nothing left in the case that we can see to defeat the defendant's recovery.

On the motion of the defendant, we have excluded exceptions numbers 13 to 27, both inclusive, because the alleged errors are not properly assigned under the rule of this Court. There is no real merit in the remaining assignments. The documentary evidence was plainly competent. As to how the husband intended to hold the property was immaterial, as the deed spoke for itself, and there was no equity for reformation set up. The business transactions of Hall & Moore were irrelevant to the inquiry, as also was the question whether Hall had assumed this debt without the assent of defendant. This did not discharge W. M. Moore as debtor; nor did Moore's reason for not paying the note have any proper bearing upon the case. He did not pay but still owed it to the bank. This was enough, and was embraced by the issues, and it was equally immaterial whether Moore had disposed of his interest in the firm of Hall & Moore. We do not understand how any of these matters, if found for the plaintiffs, could affect the result. The excluded assignments relate to the charge of the court. Although they have been put out of the case, we have carefully examined them, in connection with the instructions of the court, and discover no real merit or ground for reversal in any of them. Whether the money was deposited with the banks, half of it in each of them, for their accommodation, or was put there under a false designation of the depositor to defraud the defendant, as Mr. Moore's creditor, was for the jury to decide upon the evidence. The vital and pivotal question was, besides the one just stated, whether the plaintiff agreed, either expressly or by inference from their acts and conduct, that any estate by the entirety, theretofore existing, should be changed into an estate in severalty, one-half of the purchase money paid for the Hooker lot to be the property of each of them, was also a question for the jury. They were not to have one-half of each deposit, but one was to have the whole deposit in the National Bank of Greenville and the other Mr. Moore, the whole deposit in the defendant bank. This is what the jury have found to be the fact, upon sufficient evidence, as we think. The last question, whether the defendant may set off the debt due to it by Mr. Moore against this deposit, was decided by the Court when the case was here before (173 N. C., 180), and it was further said that if in the strictness of law this cannot be done, the defense here pleaded will be treated as a bill or action, in the nature of an equitable *fi. fa.*, as the property is not available to creditors by the ordinary legal process. Numerous authorities are cited in defendant's brief to sustain the right to set-off in such a case. As the question is an important one we will cite a few of them: *Hodgin v. Bank,* 124 N. C., 541, reversed on rehearing but on a point not material here; *Bank v. Armstrong,* 15 N. C., 519; *Clark v. Bank,* 160 Mass., 26; *Coach v. Preston,* 105 Ill., 470; *Bank v. Bank,* 46 N. Y., 82; *Garrison v. Trust Co.,* 139 Mich., 392; *Knapp v. Correll,* 77 Iowa, 528; *Reynes v. Dumont,* 130 U. S., 354; *Gibbons v. Hierx,* 105 Mich., 509; *Bank v. Meyer,* 66 Ark., 499; *Bank v. W. M. Brewing Co.,* 50 Ohio St., 151; *Falkland v. Bank,* 84 N. Y., 145.

After a careful review of the entire record we have not been able to discover that any error was committed by the court at the second trial.

No error.

CLARK, C. J., concurs in all that is so clearly and convincingly stated in the opinion of *Walker, J.,* and for the additional reason that when the land was converted into money the estate by entireties ceased, for in England, whence was derived this anomalous estate, there was never any estate by entireties in personalty. *Gooch v. Bank,* 176 N. C., 216.

The estate by entireties was not created by statute either in England or in this State, but was a judicial creation in England, and we adopted it only to the extent that it obtained there. *Gaston, J.,* in *Motley v. Whitemore,* 19 N. C., 537, says: "When *lands* are conveyed to husband and wife they have not a joint estate but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor." This was quoted by *Hoke, J.,* in *McKinnon v. Caulk,* 167 N. C., 412. It was also recognized that entireties did not apply to personalty in *Hairston v. Glenn,* 120 N. C., 341, where money was deposited in bank in the joint names of husband and wife, and a joint certificate made out for the amount, which was delivered to the husband, but on his death the wife was held entitled to recover one-half of it. While the point was not expressly raised it is clear that the counsel in that case and the court were aware that there was no estate by entireties in personalty.

There was this very good reason for this distinction for in England, until about 1880, all personalty of the wife, whether acquired before or after marriage, became the absolute property of the husband and there was no occasion for any estate by entireties. And such was the case in this State until the Constitution of 1868, which allowed a wife to retain her property, whether acquired before or after marriage.

As to realty, in England (as in this State till 1868) the realty of the wife became the property of the husband during his lifetime, and therefore for feudal reasons at her death, if he were the longer liver, it went absolutely to him instead of to her heirs, as the land was burdened with the duty of furnishing a soldier for forty days each year, if called for in the wars, for there was no standing army. If, however, the wife were the longer liver it went to her absolutely instead of to his heirs who might be minors. This is the origin of the "antiquated absurdity" of this estate, as *Justice Walker* appropriately styles it, but for which there was a good reason as to realty when it was created.

Even as to estates in entireties in realty, they have been abolished in England by the "Married Woman's Act of 1882." *Thornley v. Thornley,* 2 Ch. Div. (1893), 229. It would logically seem that such estate was abolished here by our statute of 1784 (now Rev., 1579) which converted all joint estates into tenancies in common, and still more conclusively by our Constitution of 1868 which, like the English "Married Women's Act," vested a wife with her property, real or personal.

This Court, however, held differently (as to entireties in realty), and though it has often recommended to the Legislature the abolition of this anomaly, it has not been done.

HIRAM BAGGETT v. J. B. LANIER.

(Filed 24 September, 1919.)

1. **Evidence—Deeds and Conveyances—Recitals.**

   The relevant recitals of a deed in a chain of title relied on are competent evidence of the authority of the grantor to make it. *Irvin v. Clark* cited with approval, 98 N. C., 437.

2. **Appeal and Error—Objections and Exceptions—Deeds and Conveyances—Sufficiency.**

   Objection to the introduction of a deed in a chain of title, on the ground that the preliminary fact of the destruction of the registry in which it had been recorded had not been shown, must be taken specifically to be available by exception on appeal, and this objection will not be considered when the only ground of objection stated in the record is to the sufficiency of the deed to show the authority of the grantor to make it. The objector is confined to the ground he stated below.

3. **Appeal and Error—Presumptions—Evidence—Error—Burden of Proof.**

   The rulings of the lower court in admitting evidence objected to on the trial will be presumed to be correct, on appeal, in the absence of anything of record showing the contrary, as the burden is on the appellant to show error on appeal.

4. **Motions—Proceedings—Irregularity—Collateral Attack—Actions.**

   The recitals in a deed of a commissioner appointed by the court to sell lands are *prima facie* sufficient to show his authority to do so (*Irvin v.*

Clark, 98 N. C., 437), and the proceedings wherein it was made may not be attacked collaterally for irregularity, but only by motion in the cause to have the judgment therein set aside. *Rackley v. Roberts*, 147 N. C., 201, cited and approved.

5. **Limitation of Actions — Adverse Possession—State—Color—Admissions —Instructions.**

Where the plaintiffs claim the title to the lands in controversy under a grant from the State and mesne conveyances under which a life estate is reserved to the enterer, and it appears that the enterer remained in possession as life tenant to within seven years next preceding the commencement of the action, and that the adverse possession of the defendant under which he claimed commenced after the falling in of the life estate: *Held*, such adverse possession could not begin to run against the paper title of the plaintiff until the falling in of the life estate, and that the plaintiff was entitled to recover unless the defendant showed by the greater weight of the evidence such previous adverse possession as would take the title out of the State, and would ripen it against the plaintiff's title either without or with "color."

The case of *Logan v. Fitzgerald*, 87 N. C., 308, distinguished and *Simmons v. Davenport*, 140 N. C., 407, approved as to rule that if fuller instructions are desired a request for them must be made.

ACTION tried before *Kerr, J.*, and a jury, at February Term, 1919, of HARNETT.

This is an action to recover the possession of land, for an injunction, and for damages. Defendant disclaimed ownership as to the first tract, but denied plaintiff's title as to the second tract of seventeen acres. The plaintiff claimed the land under a grant from the State, issued on 12 December, 1898, to one James R. Grady, and mesne conveyances from the latter and others to himself. Defendant asserted his right to the land by adverse possession for more than thirty years prior to the date of the grant to J. R. Grady, and he also proved that N. G. Jones conveyed it to J. R. Grady, 7 October, 1862; that John A. Green, sheriff, conveyed it to Geo. W. Pegram by deed dated 1 June, 1877, which was made by him at a sale pursuant to a levy under an execution against Grady. Geo. W. Pegram died, and his executor, John D. Pegram, sold the land, under a power contained in his will, to J. R. Grady for life, with remainder to the children of Mary I. Grady, wife of J. R. Grady, four of whom conveyed their interests as tenants in common to the defendant. The latter also introduced a deed from D. H. McLean, commissioner, to him, dated 8 July, 1911. It was admitted that J. R. Grady resided on the land and occupied it until his death, which occurred 11 June, 1906. Defendant testified that he took possession of the land immediately after receiving his deed from D. H. McLean, commissioner.

The court charged the jury that the plaintiff was entitled to recover the land unless the defendant had satisfied them, by the greater weight of the testimony, that he and those under whom he claimed or derived his title had been in possession of the land openly, notoriously and adversely for thirty years before the grant was issued to J. R. Grady, which, under the presumption that a grant had theretofore been issued, would take the title out of the State; and further, he must so prove that he and those under whom he claims had held possession of the land adversely, as above defined, for twenty years of said time, or in lieu of such proof, he must show that he and those under whom he claims has so held for twenty-one years under color of title before the State had granted the land to Grady. The verdict was for the defendant, and judgment being entered thereon, plaintiff appealed.

E. F. Young and Clifford & Townsend for plaintiff.
Charles Ross and W. P. Byrd for defendant.

WALKER, J., after stating the case: The plaintiff reserved but two exceptions—first, that the deed of D. H. McLean, commissioner, to defendant was incompetent, as it did not appear that he had authority to make it, and that it does not appear that it covers this land; and second, that the charge in reference to the possession of the defendant and those under whom he claims was erroneous.

1. We do not see why the recitals in the McLean deed were not competent and sufficient to show his authority to make the deed. *Irvin v. Clark,* 98 N. C., 437. Plaintiff relies on *Barefoot v. Musselwhite,* 153 N. C., 208. It may be that the objection was intended to be directed against the competency of this deed, because the preliminary fact as to the destruction of the record in which it was recorded and which must be shown in order to make it competent was not established. This is not the form or substance of the objection, and it therefore cannot be urged before us. But if it could, we are of the opinion that such fact was sufficiently shown by the defendant. The authority to make the deed, therefore, must be determined by the sufficiency of the recitals. The statement as to those is not very full or explicit, but enough appears to show it. If the recitals were insufficient, the plaintiff should have had them set out in the case so that we might know fully what they are. The burden of showing error is upon him, for in the absence of anything to the contrary we presume that the ruling of the court was correct, and that the necessary facts to support it had been proved. It appears by fair and reasonable inference that the deed of the commissioner was made under a decree in a regularly constituted special proceeding for the sale of the land, in which the heirs of J. R. McLean were the defendants. If the proceeding was irregular, the proper remedy is not by attacking it collaterally but by a motion in the original cause to have

the same set aside. *Rackley v. Roberts,* 147 N. C., 201; *Hargrove v. Wilson,* 148 N. C., 439; *Barefoot v. Musselwhite, supra; Pinnell v. Burroughs,* 168 N. C., 320 (*S. c.,* 172 N. C., 186).

2. The charge of the court was correct, as it appears to have been admitted that J. R. Grady was in possession of the land until his death on 11 June, 1906, and plaintiff therefore could not have had adverse possession for so long a time as seven years, because the defendant took possession about 8 July, 1911, when the deed of D. H. McLean, commissioner, was executed to him. Besides, James R. Grady had but a life estate, and the remaindermen were not affected by the statute of limitations during the period of his life.

We do not overlook *Gilchrist v. Middleton,* 107 N. C., 663, cited and relied on by the defendant, but while admitting the correctness of the rule as to the sources of title and the different kinds of title under which a party may claim, which is there stated to be that he may assert title by adverse possession under color for seven years, where the State has been divested of its title by grant or adverse possession for thirty years, as well as by twenty years of such possession without color, the question at last is, not merely whether that can be done, but whether the plaintiff has brought his case within the rule. No kind of adverse possession will avail the plaintiff unless it was continued long enough to ripen his title, as against this defendant, claiming a remainder after the life estate of J. R. Grady, for during his lifetime his children, from whom defendant derived his title, could not enter, as they had no right to do so, and consequently their right of entry could not be tolled by adverse possession of the plaintiff. It would not do to forbid one to enter upon land and at the same time bar his right, because he did not enter and preserve his right against a trespasser whose possession might have continued for seven years with color or twenty years without, and ripen his imperfect title into a good one. In this case the plaintiff's proof has failed to come up to the standard in the face of his admission that J. R. Grady continued to occupy the land in dispute until his death. *Henley v. Wilson,* 77 N. C., 216; *Todd v. Zachary,* 45 N. C., 286; *Woodlief v. Webster,* 136 N. C., 162; *Joyner v. Futrell, ib.,* 301. The case of *Logan v. Fitzgerald,* 87 N. C., 308, cited by the plaintiff, is not applicable as there the judge merely failed to correctly define adverse possession. If the plaintiff felt that he needed fuller instructions he should have asked for them. *Simmons v. Davenport,* 140 N. C., 407.

It may be that all of the evidence is not set out in the record, or not distinctly so, but as it now appears to us, the principles of law we have stated must govern the case, and when they are correctly applied, as was done by the court below, there can be no error upon the facts found by the jury.

No error.

M. B. PARRISH AND WIFE v. M. F. HODGE.

(Filed 1 October, 1919.)

Estates Tail—Statutes—Fee Simple—Heirs of the Body—Issues—Rule in Shelley's Case distinguished.

Where the grantors, reserving an estate for their lives, have conveyed lands by deed to H. with habendum and warranty "to have and to hold to H. and heirs of her body or issue, to their only use and behoof forever," the word "issue" so used, and in connection with the expression, "heirs of her body," is construed to be the equivalent of the latter expression, which has its natural and primary significance of "lineal descendants to the remotest generation," and being an estate tail, is converted into a fee simple under the statute (Rev., sec. 1758); and the intention of the grantor is emphasized by the fact, in this case, that H. was unmarried at the time of the conveyance, without children, and evidently the only one considered or who was then in a position to take and hold the interest. *Ford v. McBrayer*, 171 N. C., 420, involving the interpretation of the rule in *Shelley's case*, cited and distinguished.

CONTROVERSY without action, heard before *Kerr, J.,* at May Term, 1919, of HARNETT.

The controversy involved the right of plaintiffs to collect the purchase money for a piece of land sold by plaintiffs to defendant which the parties agreed should depend on whether plaintiffs' deed conveyed a good title. There was judgment for plaintiffs, and defendant excepted and appealed.

James D. Parker for plaintiffs.
G. A. Martin for defendant.

HOKE, J. The facts affecting the validity of the title offered are as follows: "The land in question was owned by J. A. Norris and on 4 June, 1901, said J. A. Norris and wife, Z. A. Norris, conveyed the same, reserving a life estate, to Hattie I. Norris (now Wade) habendum and warranty as follows: 'To have and to hold the aforesaid tract of land to Hattie I. Norris and heirs of her body or issue, to their only use and behoof forever.'

"And the said James A. Norris and wife, Z. A. Norris, covenant with said Hattie I. Norris, heirs of her body, that they are seized of said lands in fee simple; that the same are free and clear from all encumbrances, and that they will warrant and defend the title to same against the claims of all persons whatsoever."

That on 25 November, 1912, the life tenants, James A. and Z. A. Norris, his wife, and also Hattie I. Wade, executed a deed in fee for said land to plaintiffs.

It thus appears that the question in controversy depends on the estate conveyed to Hattie I. Norris by the deed from J. A. Norris and wife, and on the facts presented we concur in the ruling of his Honor that the deed conveyed an estate of absolute ownership in remainder. And the life tenants and Hattie I. and her husband James having joined in the deed conveying the land in fee to plaintiffs, the title offered is a good one, and defendant must comply with the contract of purchase.

Under our statute converting estates tail into estates in fee simple (Rev., sec. 1758), this habendum to Hattie I. Norris, "to have and to hold the aforesaid tract of land and all privileges and appurtenances thereto belonging, to her and the heirs of her body or issue, to *their only use and behoof forever*," created an estate in fee, it being clear that the words "or issue" were intended as synonymous with "heirs of the body" and to have the same significance as to the character of the estate conveyed. *Revis v. Murphy,* 172 N. C., 579; *O'Neal v. Borders,* 170 N. C., 483; *Perrett v. Bird,* 152 N. C., 220, and cases cited. This appears not only from the language of the habendum indicating that an estate of inheritance was intended for Hattie, but the interpretation is emphasized by the condition of the parties and the warranty clause, showing that an estate of absolute ownership was being presently conveyed, and Hattie, the grantee named, then unmarried and without children, being evidently the only one considered or who was then in a position to take and hold the interest.

In *Ford v. McBrayer,* 171 N. C., 420, to which we were referred by counsel in support of defendant's position, it is fully recognized that the word "issue" is not infrequently construed to mean lineal descendants and the equivalent of the "heirs of the body." And while it is said in that case that the courts rather lean to the position that the word should be considered as a word of purchase in the sense of children, etc., this was said in reference to an instrument involving an application of the rule in *Shelley's case,* where, in pursuance of a public policy prevalent at the time the rule was established, a life estate, given in express terms to the first taker, was entirely disregarded, and a rule which as well stated in the opinion the "Courts were loath to extend." And in *Puckett v. Morgan,* 158 N. C., 344, another decision where an estate for life was given the first taker, the application of the rule in *Shelley's case* was denied by reason of additional words appearing in the limitation in remainder to the "heirs of the body," and tending to show that these words were not used in the general sense of all takers by inheritance, the significance required for a proper application of the rule in *Shelley's case,* and for that reason the estate for life was allowed to stand as written in the devise.

But in our case, while a life estate is reserved to the grantor, there is no life estate given to Hattie I. Norris, the first and only grantee in remainder, but the estate and interest is conveyed to said grantee "to have and to hold the aforesaid tract or parcel of land and all the privileges and appurtenances thereto belonging, to the said Hattie I. Norris, the heirs of her body or issue, to their only use and behoof forever," and in such case we see no reason why this deed should not be held to cover an estate in fee according to its evident intent. Nor why the term issue appearing in this habendum should not be allowed its natural and primary significance of "lineal descendants to the remotest generation," and so the equivalent ordinarily of "heirs of the body." *Nobles v. Nobles,* 177 N. C., 243; *White v. Goodwin,* 174 N. C., 724; *Revis v. Murphy,* 172 N. C., 579; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273; *Shuford v. Brady,* 169 N. C., 224; *Triplett v. Williams,* 149 N. C., 394; 2 Bouvier's Law Dic. (3 Rev.), 1686-87; 2 Words and Phrases (second lines), 1213-1214, citing among other authorities *Perry v. Bulkley,* 82 Conn., 158; *Coates v. Burton,* 191 Mass., 180; *Robeson v. Cochran,* 255 Ill., 355; *Dick v. Ricker,* 222 Ill., 413.

We are of opinion that the deed has been correctly construed and the judgment of the Superior Court is affirmed.

Judgment affirmed.

LOVIE T. WHARTON, ADMINISTRATRIX, v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 1 October, 1919.)

1. **Insurance, Life — Policies — Contracts — Suicide — Defenses—Burden of Proof—Instructions—Jury—Trials.**

   The burden is on the defendant life insurance company, in an action on the policy, to show that the deceased insured committed suicide which invalidated the policy, according to its terms, when this is relied upon as a defense, which will take the case to the jury upon the issue.

2. **Insurance, Life — Policies—Contracts—Accidents—Passengers—"Traveling."**

   Where there is a liability under the provisions of a policy of life insurance, "when the death of the insured was caused directly by accident while traveling as a passenger by common carrier," the fact that the insured was accidentally killed at an intermediate station, after he got off the train until it should start again, and while attempting to board it to continue his journey, does not deprive him of his status as a passenger under the provision of the policy, or avoid liability on the part of the company.

3. Clerks of Court—Executors and Administrators—Granting of Letters—Actions—Collateral Attack—Jurisdiction—Appeal and Error.

Where the clerk of the Superior Court has issued letters testamentary upon sufficient evidence, his action in doing so cannot be collaterally attacked, to oust jurisdiction, in the administrator's action, as such, to recover upon an insurance policy, but only before the clerk to cancel the letters; nor can it be raised for the first time in the Supreme Court, on appeal, when it has not been pleaded, and upon exception to a refusal of defendant's motion to nonsuit.

APPEAL by defendant from *Daniels, J.,* at April Term, 1919, of PAMLICO.

This was an action on a $5,000 insurance policy on the life of Raymond M. Wharton, with the following additional provision: "Or double the face of this policy upon receipt of due proof that the death of the insured was caused directly by accident while traveling as a passenger on a street car, railway train, steamboat licensed for transportation of passengers, or other public conveyance operated by a common carrier." And with the further provision: "In event of self-destruction during the first two years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premium thereon which has been paid to and received by the company and no more."

The defendant set up the defense that "the death of plaintiff's intestate was caused by his own act of self-destruction." The jury found the issues as follows:

1. Was the death of the said Raymond M. Wharton caused directly by accident while traveling as a passenger on a railroad train operated by a common carrier. Answer: "Yes."

2. Was Raymond M. Wharton's death due to self-destruction? Answer: "No."

3. In what amount, if any, is defendant indebted to the plaintiff? Answer: "$10,000, with interest from 20 June, 1917, at the rate of 6 per cent per annum, until paid."

Judgment accordingly. Appeal by defendant.

Z. V. Rawls, D. L. Ward and Ward & Ward for plaintiff.
James H. McIntosh, Moore & Dunn and James H. Pou for defendant.

CLARK, C. J. It is admitted that the plaintiff's intestate, R. M. Wharton, on 3 June, 1917, boarded a train at Greensboro with ticket to Goldsboro, which train was due to arrive in Raleigh at 4:20 a. m. It was also in proof that the deceased bought a thousand-mile book at Greensboro and exchanged 189 miles of it for a ticket to New Bern and rode in the white day coach from Greensboro to Raleigh, and was killed by the same coach as the train was backing out of the Raleigh station about 4:35 a. m., and that he had on his person the mileage book and coupon from Greensboro to New Bern and was on his way to his farm and home in Pamlico County. It was also in evidence that his family was in Greensboro for the purpose of educating his children and that he had a small grocery store there.

It was also in evidence that he stepped off the coach at Raleigh but remained in the station and was walking up and down on the concrete pavement between the tracks, and was some ten feet from the track when "all aboard" was called; that he was then either standing or sitting on a box and started towards the backing train; that in some way he got on the track between the Pullman and the day coach and was run over and killed.

The defendant offered evidence which it contended should have satisfied the jury that he deliberately crawled under the backing train for the purpose of being run over. The plaintiff offered evidence that it contended should satisfy the jury that the deceased ran to get on the day coach and the door of the vestibule at that end to the Pullman being closed he stumbled or fell and was caught on the track between that car and the Pullman and was run over and killed. They also offered evidence tending to show that the deceased had no motive to commit suicide and that his death was entirely accidental.

This evidence was earnestly discussed here, and doubtless before the jury. The jury, however, found that the death of the deceased was caused by an accident and not as an act of self-destruction. It can serve no purpose to elaborate the testimony for there was evidence tending to sustain the theory that the death was caused by an accident, and the burden of proof was upon the defendant to establish its allegation that the death was deliberate self-destruction. The function of the jury was to determine the fact. The burden of proof being on the defendant to prove its defense, the court could not adjudge that an affirmative defense is proven, for that involves the credibility of the witnesses, which is a matter for the jury. *Spruill v. Ins. Co.,* 120 N. C., 141, and numerous citations thereto in the Anno. Ed. Besides, there was evidence to go to the jury that the death of the deceased was accidental.

This is not a question whether the deceased was guilty of contributory negligence, for if it were conceded that he was this does not of itself prove an intent to commit suicide. The presumption of law also is against self-destruction, and the burden is on the party who is asserting it. The court properly charged the jury that the burden was on the defendant to satisfy the jury by the greater weight of the evidence that the deceased got in the way of the train with the intent to destroy himself, and unless the jury so found to answer the second issue "No."

The court also charged the jury: "If you find from the greater weight of the evidence that Raymond M. Wharton, the deceased, purchased the ticket from Greensboro to New Bern and was proceeding on the journey on the train that killed him, and on the arrival of the train at Raleigh, where it had a stop for some little time prior to its proceeding to Goldsboro, and he got off the train for the purpose of getting a cup of coffee or some breakfast or for any other legitimate purpose, and with the intent to take the same train at the time of its departure and continue his journey, and that at the time the conductor or porter cried 'all aboard' for the departure of the train he was waiting and undertook to get aboard the cars to continue his journey, and in the effort to get aboard he accidentally fell on the track and was thus accidentally injured and died the same day from the effect of the injury so received, you should answer the first issue 'Yes.'" The defendant also excepted to this, but it is correctly stated.

The defendant further contends that as the policy provides liability "when the death of the insured was caused directly by accident while traveling as a passenger," that the deceased having gotten off the train while it was standing in Raleigh, he was not traveling as a passenger at the time. He cites certain cases where it was so held when the accident occurred under a policy which provided that the injury must occur while the passenger is *"riding* on the train." It is not necessary to consider whether this is not too technical (and in fact it has been overruled), for here the language of the policy was altered, perhaps intentionally on account of those decisions, and provides "while the insured is traveling as a passenger."

These words have been construed by this Court in *Wallace v. R. R.*, 174 N. C., 174, which held: "One who has purchased his ticket to his destination on a passenger train does not relieve the railroad of its duty to him as such passenger by getting off the train during its stop at an intermediate station, without notice to its employees or objection from them, to see some person there on business." In that case there is a full and well-considered opinion by *Allen, J.,* who held, with citation of authorities, that while there is some conflict "The better rule, and one supported by the weight of authority, is that a passenger does not lose his rights as such by leaving the train temporarily at an intermediate station for a lawful purpose. 10 C. J., 624; 4 R. C. L., 1040; *R. R. v. Satler,* 64 Neb., 636; *Dodge v. R. R.,* 148 Mass., 207; *Parsons v. R. R.,* 113 N. Y., 355; *R. R. v. Coggins,* 32 C. C. A., 1, and other authorities in the notes to the citations from *Corpus Juris* and Ruling Case Law, *supra."* He becomes a passenger when he goes on the premises for that purpose, and this relation continues till the termination of the contract of carriage. *Daniel v. R. R.,* 117 N. C., 592, and citation thereto in the Anno. Ed.

The defendant also contends that there is a defect in jurisdiction in that letters of administration were taken out in Pamlico County. The plaintiff testified that at the time of the accident her husband had two homes; that he had been living in Greensboro nearly a year but that his sojourn there was temporary and for the purpose of educating the children; that their house and home were in Pamlico, and she had returned there soon after the death of her husband. The probate court, having found that the plaintiff's home and the residence of the deceased was still in Pamlico at the time of his death, issued letters of administration there, and they cannot be impeached collaterally. The defendant should have moved in that court to cancel her letters in Pamlico if it had sufficient proof. *Reynolds v. Cotton Mills,* 177 N. C., 412.

This point was not made on the trial nor is it presented by any assignments of error. The defendant attempted to raise it here for the first time on his general exception to the refusal of the motion to nonsuit. Had it been pleaded, or even had exception been taken on the trial, the plaintiff would have had opportunity to put on fuller testimony. The objection cannot be raised collaterally when it is not pleaded as a defense. It is not seen that the defendant has been prejudiced in any wise by the action having been brought in Pamlico instead of Guilford.

No error.

GEORGE B. PATE v. FLORENCE K. BANKS.

(Filed 1 October, 1919.)

1. **Drainage Districts—Statutes—Assessments—Incumbrances—Warranty—Deeds and Conveyances—Mortgages.**

The assessments upon lands in a drainage district, formed under the statute, ch. 442, Laws 1909, and amended by ch. 67, Laws 1911, are a lien *in rem* on the lands of the owner, for the payment of the bonds issued by the district in accordance with the statute, the district being a geographical *quasi*-public corporation, and the benefits annually accruing to the advantage of successive owners, such assessments are due and payable at stated intervals, but are not the personal obligation of the owner until they are due, nor, until they fall due, an encumbrance within the intent and meaning of a warranty in a deed.

2. **Drainage Districts—Assessments—Notice—Statutes—Nonresidents.**

The purchaser of lands within a drainage district formed under the provisions of ch. 442, Laws 1909, as amended by ch. 67, Laws 1911, is fixed by the statute with notice of the assessments and the time thereof, whether a resident of another State or not.

APPEAL by plaintiff from *Allen, J.,* at Chambers, 17 July, 1919; from LENOIR.

The Moseley Creek Drainage District, which lies partly in Craven and partly in Lenoir, was established under ch. 442, Laws 1909, amended by ch. 67, Laws 1911, by proceedings taken out in Craven but embraced certain lands in Lenoir, among which is part of the tract conveyed by the defendant to the plaintiff, 30 August, 1913, with covenants of warranty against "encumbrances." The regularity of the drainage proceedings as to this land has been upheld in *Banks v. Lane,* 170 N. C., 14, which was affirmed on rehearing, 171 N. C., 505, and certain other questions connected with it were passed upon in *Taylor v. Comrs.,* 176 N. C., 217. The drainage district and the amount of the assessments were confirmed on 17 April, 1911. These assessments became due and collectible in ten annual installments, the first of these maturing in 1914, about one year after the conveyance to the plaintiff by the defendant.

The plaintiff executed to the defendant a mortgage for $4,000 to secure the balance of purchase money. After the opinion in *Taylor v. Comrs., supra,* was rendered, the defendant demanded payment of $2,300 balance due on purchase money, and began advertisement of foreclosure under the mortgage. This action was instituted to restrain such foreclosure. Upon the hearing the court dissolved the restraining order, holding that on 30, August, 1913, no part of said assessments were encumbrances in the scope of the warranty in the deed. The plaintiff appealed.

Rouse & Rouse and Y. T. Ormond for plaintiff.
Dawson, Manning & Wallace for defendant.

CLARK, C. J. The only question presented is "whether the drainage assessments against the land which was conveyed to the plaintiff by the defendant on 30 August, 1913, none of which were due and payable at the time of the conveyance, constitute an encumbrance against said land on that date which was contemplated by the covenant against encumbrances."

In *Taylor v. Comrs.,* 176 N. C., 224, the Court, while holding that the point was not absolutely necessary to a decision of that case, said: "But as the case is before us we think it proper to say that the view of the clerk is correct, that the lands are liable to the drainage assessments just as land is liable for other taxes as they fall due from time to time. As owner of the land he does not have to consent to the assessment of either the drainage tax or county or State taxation. The drainage tax becomes a lien, just as the benefits accrue, i. e., annually.

The decree in the drainage district is not a personal liability of Mrs. Banks nor is it a personal liability of George B. Pate. It is a lien *in rem,* accruing annually and resting upon the land into whosoever hands it may be at that time. Pate, as purchaser, entered into possession of the land nearly two and a half years after the final decree establishing the drainage district, and presumably with physical knowledge of the drainage district. While such lien was decreed by the final judgment, 17 April, 1911, the assessments were not liens then but only became such as they subsequently accrued, respectively. They were not actual liens and collectible till each fell due, in turn, in the years 1914 to 1921, and therefore not encumbrances within the meaning of the warranty clause of the deed any more than taxes falling due in each future year. We do not see that Mrs. Banks has any cause to restrain the collection of the assessment foi drainage, upon the allegation that she would be liable on her warranty. The future benefits are adjudged to be more than 'the charge.' "

Neither the plaintiff nor the defendant, it appears, had actual notice of the drainage district at the time of the conveyance, and the defendant was then a resident of South Carolina. But they were fixed with legal notice by the proceedings which were conducted in the manner and with the publication of notices prescribed by statute, and we so held. *Banks v. Lane,* 170 N. C., 14, affirmed on rehearing, 171 N. C., 505, and in *Taylor v. Comrs.,* 176 N. C., 217. The system of drainage districts was created by the Legislature as a matter of public policy, and the notices required being a sufficient compliance with constitutional requirements, as we have repeatedly held in numerous cases, the fact that a vendor happens to be a nonresident or the vendee fails to go upon the land for examination by himself or an agent cannot vitiate the proceedings nor can it make the duties and other charges, which will accrue from time to time upon land in the drainage district, an encumbrance. The law makes no exemption for such reasons. If it did so it would make it difficult to sell land lying in these districts.

The lien of the charges for drainage is not a debt of the owner of the land therein, but is a charge solely upon the land and accrues, *pari passu* with the benefits as they shall accrue thereafter. They are not liens until they successively fall due, and are presumed to be paid out of the increased productiveness and other benefits as they accrue from time to time. These assessments are to be levied from time to time to pay, not the indebtedness of the owner of any tract but to pay the bonded indebtedness of the district. In that they are exactly like bonds issued by the township, county, or State for public benefits and which become liens on property *in future* only to the extent of the taxes falling due each year to pay the interest and such part of the principal as may become due. One who purchases land in a township, county or State cannot complain that these successive tax liens will from time to time be collectible out of his realty. Whether he knew of the existence of such indebtedness or not makes no difference. They are not encumbrances within the sense of the warranty clause of a deed. The assessments in a drainage district to take the water off the land is simply an annual tax for that purpose, limited in this case to ten years, just as bonds issued by a township, county or State become an annual lien to the extent of the amount falling due each year of principal and interest and limited to ten or twenty, or forty years, as may be prescribed.

In like manner to drainage districts, the Government has created irrigation districts in the western part of the Union, the cost of which is charged upon each tract of land for a series of years or *in perpetuam.* These are not encumbrances but, like the cost of taking water off the land or for payment of bonds issued for roads or other purposes, are a "charge" upon the land, falling due from time to time.

These "public charges" are entirely different from a mortgage which is to secure an indebtedness of the mortgagor for a benefit such as money borrowed, or other purpose, already received, nor like the laborer's or mechanic's lien, which is for benefit already received, and which is primarily a personal debt of the employer.

"Pavement" assessments, as is said in *Raleigh v. Peace,* 110 N. C., 32, are like these assessments for drainage purposes, being "founded upon the principle that the land abutting upon the improvement receives a benefit over and above the property of the citizens generally and should be charged with the value of such peculiar benefits" and "do not authorize a personal judgment against the owner of the property." Being a public charge, the owner is not liable therefor and the purchaser takes the land *cum onere.*

In the case of laying water on the land in an irrigation district, or in taking the water off in a drainage district, the benefits will arise anew each year, and the assessments are presumed to be more than counterbalanced by the benefits which shall accrue. It is so adjudged in the decree creating the district. Otherwise, the district would not be made. The annually recurring benefits in an irrigation district or a drainage district accrue to the then owners of the property, and can be of no benefit to him who has parted from it by sale. The charge runs with the land as do the annual benefits. The vendor receiving none of the recurring benefits, is not liable for the recurring charges. Both alike are *in rem* and accrue to the land in the hands of the then owner.

It is otherwise when the owner of lands gives a mortgage for a benefit already accrued or there is a laborer's or a mechanic's lien for work, or lien for material already furnished.

The drainage system was deemed by the Legislature a measure required for the public benefit. While a drainage district is not a governmental agency like a township or county (*Sanderlin v. Luken,* 152 N. C., 741; *Comrs. v. Webb,* 160 N. C., 594; *Leary v. Comrs.,* 172 N. C., 26), it is a geographical *quasi*-public corporation, and the bonds issued by it for the improvement of the district, like bonds issued for public roads or other purposes, become an indebtedness of the district and not of any landowner therein. These bonds, in the case of township and county bonds, are not an "encumbrance" nor yet a lien. They are a "public charge" which falls upon the land in the district *in rem* and to be collected in the same manner as all other public charges, but do not become a lien till the maturity each year of the prescribed amount falling due.

If the drainage district and its assessments and other duties and burdens were an "encumbrance" then the vendor of land lying therein would incur no end of liability, for from time to time other assessments must be called for to maintain, or perhaps extend, the drainage system. The liability, however, is upon the land only, and the grantee takes it just as he takes property subject to the payment of other public bonds already issued or to be issued, but which are an "encumbrance" for which the vendor is liable only to the extent that any installment of the charge or tax is past due.

Affirmed.

JAMES BREWINGTON v. CLARISSA HARGROVE ET ALS.

(Filed 1 October, 1919.)

1. **Mortgages—Powers—Deeds and Conveyances—Sales of Land—Irregularities—Notice.**

   Where a *bona fide* grantee of lands has acquired them from a purchaser at a mortgage sale, under a power contained in the mortgage, with no vitiating facts appearing in his chain of title, and without notice of any irregularity of sale or otherwise that would avoid it, his deed is good in respect thereto.

2. **Mortgages—Advertisement—Sales—Deeds and Conveyances—Recitals—Prima Facie Evidence—Burden of Proof.**

   The recital in a deed to lands sold under a power of sale contained in a mortgage that due advertisement as required by the mortgage and the law had been made, is *prima facie* evidence of the fact, and places the burden of proof upon the party to the action claiming otherwise.

3. **Mortgages— Powers—Sales—Advertisements—Defects—Mortgagor's Acquiescence—Deeds and Conveyances.**

   The acquiescence of the mortgagor of lands at a sale of his lands under a power contained in his mortgage will cure any defect therein as to the advertisement by notice "at the courthouse door and three other public places."

4. **Mortgages—Sales—Advertisement—Date of Sale—Presumptions—Postponement—Deeds and Conveyances.**

Where the advertisement for the sale of lands under mortgage is for a certain date, and the recital in the purchaser's deed is that it took place two days later, the presumption is that it was legally postponed for that time, and in the absence of rebuttal evidence, it will be held valid in that respect.

5. **Mortgages — Assignment — Advertisement—Sales—Legal and Equitable Interests.**

The mortgagee of land assigned his rights thereunder to a third person, and they both advertised according to the power of sale contained in the mortgage, and sold the land thereunder: *Held*, as both the holder of the legal title and the holder of the equitable title concurred and united in giving the notice and making the sale, there is no defect in the execution of the power that could affect the title of the purchaser.

6. **Mortgages—Sales—Executors and Administrators—Statutes.**

The personal representative of the deceased mortgagee or trustee of lands is vested with statutory authority to foreclose in accordance with a power of sale contained in the instrument. Rev., sec. 1031.

APPEAL by defendants from *Guion, J.*, at March Term, 1919, of SAMPSON.

On 27 December, 1910, J. N. Bennett and Clarissa Hargrove, his mother, executed a mortgage to C. S. and T. A. Hines to secure certain indebtedness. The property conveyed was one tract of land, the property of Bennett, consisting of 141 acres, and the other, 21½ acres, the property of Clarissa Hargrove. C. S. and T. A. Hines assigned the notes and mortgage to D. A. Edwards, who died in February, 1914, and his administrator is defendant in this action.

On 13 December, 1915, a notice and advertisement of sale under the power contained in the said mortgage deed, which had been assigned to D. A. Edwards, were given, signed by C. S. and T. A. Hines, mortgagees, and Wilbur T. Edwards, administrator of D. A. Edwards, assignee of the mortgage. The notice specified that the sale would take place on 16 January, describing the land conveyed in the mortgage. A deed executed on 19 January, 1916, by C. S. Hines and T. A. Hines, mortgagees, and Wilbur T. Edwards, administrator of D. A. Edwards, assignee, recites that the property was exposed by them for sale on 18 January, 1916, at 12 o'clock noon, at which sale Thomas Perrett became the last and highest bidder in the sum of $1,000, and the deed was executed to him accordingly. Perrett testified that he bought the land for J. N. Bennett, but paid no money for it; that on 8 January, 1916, he conveyed these two tracts of land to Wilbur T. Edwards for $1,100, as an individual and not as administrator. By deed 1 December, 1916, Edwards conveyed the two tracts of land to Brewington, the plaintiff. There was evidence to show that the 141-acre tract of land at the time of the sale was worth $3,000 to $4,000.

The jury found, upon the issues submitted, that Brewington, the plaintiff, purchased the 21½ acres of land, formerly the property of Clarissa Hargrove, without notice of any equities in her favor, and that the land was duly advertised according to the terms of the mortgage. Judgment for plaintiff for recovery of the tract of land.

The jury further found that W. T. Edwards, administrator of the assignee of the mortgage, procured Perrett as his agent to bid and purchase said land at the sale under the mortgage, and that its value at that time was $29 per acre, whereupon it was adjudged that the plaintiff is entitled to the 21½ acres of land and rents and costs, and that Clarissa Hargrove recover of Wilbur T. Edwards the sum of $406.11, with interest from December, 1916.

J. Faison Thomson, Fowler & Crumpler and Murray Allen for plaintiff.

Stevens & Beasley and H. E. Faison for defendants.

CLARK, C. J. There was no evidence to go to the jury to show that James Brewington purchased the 21½ acres formerly the property of Clarissa Hargrove, with notice of any infirmity, and the judge properly instructed the jury to answer the first and second issue accordingly. There was no vitiating fact appearing on the face of the deeds in the chain of title. *Smith v. Fuller,* 152 N. C., 7. Brewington was not purchaser at the sale but bought from Wilbur T. Edwards.

The court properly refused to instruct the jury that the burden was upon the plaintiff to show that the land was advertised by notice published at the courthouse door and in three other public places. The deeds signed by the mortgagee and the assignee of the mortgage recited that due advertisement as required by the mortgage and by law had been made. These recitals are *prima facie* evidence of the fact. The acquiescence of the mortgagor in the conduct of the sale will cure any defect in this respect. *Lunsford v. Speaks,* 112 N. C., 608, cited and approved; *Norwood v. Lassiter,* 132 N. C., 58. It is true the recital is that the sale took place on 18 January while the notice shows that the advertisement was for 16 January, but the presumption, which was not rebutted by any evidence, is that it was postponed till the 18th, and the mortgagor waived any objection on that ground by making no protest and taking no action to set aside the sale. *Norwood v. Lassiter, supra.*

The defendants requested the court to charge the jury that the mortgage notes having been assigned by C. S. Hines and T. A. Hines to

D. A. Edwards, Edwards became only the equitable owner, the naked legal title still remaining in C. S. Hines and T. A. Hines, and this being so, the equitable title would only have authorized D. A. Edwards to compel a foreclosure and sale by order of court; and that C. S. Hines and T. A. Hines, after the assignment of the notes, simply held the legal title, and having no debt against the land could not execute the power, and the assignee of D. A. Edwards, being the owner of the debt and having no power of sale transferred to him, his administrator could not sell because he was merely the equitable owner, and the attempted sale by notice from C. S. and T. A. Hines and the administrator of Edwards, assignee, was void. The court properly refused the prayer.

As both the holder of the naked legal title and the holder of the equitable title concurred and united in giving the notice and making the sale there can be no defect in the execution of the power conferred by the mortgage. *Weil v. Davis,* 168 N. C., 298.

The plaintiff did not buy at the mortgage sale but was a subsequent grantee without notice and in good faith and takes a good title against irregularities in the sale, if any, of which he had no notice. *Hinton v. Hall,* 166 N. C., 480; 27 Cyc., 1494.

Revisal, 1031, authorizes the personal representative of a mortgagee or trustee who is vested with power of sale in the mortgage or trust deed to advertise and sell under said power. Whether this would confer the like power upon the executor or administrator of the assignee of the mortgage is a question not presented on this record.

Affirmed.

ADDIE SPEIGHT v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 8 October, 1919.)

1. **Telegraphs—Intrastate Commerce—Interstate—Relays.**

   A telegraph company accepting a telegram to be transmitted between points in this State, where a recovery for mental anguish is allowed, may not avoid such liability under the Federal decisions by unnecessarily sending the message through another State, when it could have reasonably been otherwise transmitted.

2. **Constitutional Law—Federal Government—State's Rights—Commerce—Telegraphs.**

   The power to regulate commerce among the several States, etc., is delegated to the Federal Government by Art. I, sec. 8, clause 2, of the Federal Constitution, and the right to regulate intrastate commerce is among those reserved to the State under the tenth amendment; and where a telegram is of intrastate character, the jurisdiction of the State courts may not be ousted by the telegraph company unnecessarily relaying it at its offices in another State. This will not change it into an interstate message.

3. **Telegraphs — Commerce—Interstate—Relays—Burden of Proof—Verdict Set Aside.**

Where a telegraph company has direct available facilities for transmitting an intrastate telegram altogether within the State, and relays it at offices in another State, the burden of proof is upon it to show that it was not done to evade the jurisdiction of the State court, and it is reversible error for the trial judge to set aside the answer to the issue in the plaintiff's favor as a matter of law.

ALLEN, J., dissenting. WALKER, J., concurring in opinion of Court.

APPEAL by defendant from *Kerr, J.*, at November Term, 1918, of HALIFAX.

This was an action for damages for the negligent alteration in the transmission of a telegram from Greenville, N. C., to Rosemary, N. C., both in this State. The message was as follows:

"GREENVILLE, N. C., 9:45 A. M.
1-24-18.
MRS. ADDIE SPEIGHT,
Rosemary, N. C.
Father died this morning. Funeral tomorrow, 10:10 a. m.
APPIE O. SMITH."

This message was delivered to the plaintiff at Rosemary, N. C., on the same day with the date changed from 24 January to 23 January, 1918, thus making the telegram read "Father died this morning (i. e., 23 January). Funeral tomorrow (i. e., 24 January)."

Upon receiving this message in the changed form the plaintiff believed that her brother, who was the father of the sender of the message, died on 23 January and would be buried on the 24th, the date of its delivery, and it was impossible for plaintiff therefore to reach Greenville in time to attend the funeral. If the message had been correctly dated it would have been apparent that the funeral was to take place on 25 January, and the plaintiff was thus misled and prevented from attending the funeral. The jury responded to the issues that the message sued on was sent out of North Carolina into Virginia and thence back into North Carolina "for the purpose of fraudulently evading liability under the laws of North Carolina"; that it was "negligently changed in transmission in the manner alleged by plaintiff," and that she was entitled "to recover $100 damages."

The court set aside the verdict, being of opinion that as a matter of law in no view of the testimony was the plaintiff entitled to recover, and entered a judgment of nonsuit. The plaintiff appealed.

The defendant's appeal is upon the ground that there was no evidence to submit to the jury upon the first issue whether the message was sent out of the State, through Weldon to Richmond, thence to Norfolk, and thence back through Weldon to Rosemary to evade the State law.

The plaintiff's appeal is upon the ground that the court set aside the verdict as a matter of law because the message upon the evidence was interstate and therefore damages could not be recovered.

George C. Green, J. P. Pippen and Murray Allen for plaintiff.
W. E. Daniel for defendant.

CLARK, C. J. We do not think it necessary to pass upon the question presented by the defendant's appeal for we deem that as a matter of law this was an *intrastate* message and hence governed by our decisions, and it is immaterial whether the message was sent through Weldon, N. C., to Richmond, Va., and thence to Norfolk, Va., and thence back through Weldon, N. C., to Rosemary, N. C., in order to evade the North Carolina laws applicable to the transmission of messages of this nature in intrastate commerce, or whether this remarkable circumlocutory method of transmission was due solely to the method which the defendant corporation had adopted for its own convenience in transmitting messages from Greenville to Rosemary. Both these points are in this State, and the defendant has a continuous line entirely in this State and in operation from Greenville to Rosemary. It transmits messages from Greenville to Weldon (67 miles) without going through Richmond, and it transmits messages from Weldon to Rosemary without sending them through Norfolk. It could have transferred this message at Weldon, N. C., and it did not make this an interstate message because the corporation chose to forward it to Richmond, Va., thence to be sent back through Norfolk, Va., to Rosemary, N. C.

It could as well have sent the message to Raleigh, to which it has a direct line, there to be transferred to Rosemary, to which point there is also a direct line from Raleigh, all in this State.

It was by the defendant's own method, adopted for its own convenience, or according to the notions of some superintendent, that there were two transfers made at Richmond and at Norfolk, both in another State, instead of by the natural method of one transfer point either at Raleigh or Weldon, both in this State.

If the defendant saw fit to adopt business methods requiring this remarkable system of making three transmissions each of greater length than the entire distance from Greenville to Rosemary, i. e., Weldon to Richmond, Richmond to Norfolk, and Norfolk to Rosemary, it does not concern the plaintiff, provided the message was delivered with promptness and without this error in transmission, which was doubtless caused by the additional relays required by this system of transmission.

If a package were sent by mail route or by stage, or by wagon, from Greenville to consignee in Rosemary, there being a continuous route between the two points in such condition that it did not require the wagon or stage-coach to go through Virginia to get from Greenville, N. C., to Rosemary, N. C., this would be an *intrastate* transaction, and the fact that the carrier chose that roundabout method of making the transportation through another State would not make this interstate commerce.

Frequently cars are put into "through trains" which rarely stop to cut out cars. If a carload of tobacco were shipped from Greenville to Rosemary, there being, as there is, continuous rail connection between the two points, this would not become interstate commerce because the railroad company, being reluctant to cut out the car at Weldon, should, for its own convenience, carry it on to Richmond, thence send it to Norfolk and then again tranship it from Norfolk through Weldon to Rosemary. The convenience or the whim of the carrier does not repeal the jurisdiction of the State over matters retained by it in its grant of interstate commerce to the Federal Government.

If the jurisdiction of the State depends upon the method which the telegraph company shall see fit to adopt in the transmission of messages from one point to another in the State, the State laws could be repealed entirely, and doubtless would be, by the defendant telegraph company simply sending every message between two points in this State to a point outside the State and thence back into North Carolina, for it would be almost impossible to prove that this was done to evade the State jurisdiction since no one but the defendant and its agents can know its motive. The question is not the motive of the defendant in shifting around its messages in this most extraordinary manner, but whether it has a direct line between the two points which is in regular use and not out of repair, and which can be used without carrying the message to another State and thence back into this State. It is not a question of motive, nor of what method the defendant prefers to do its business, nor of red tape, but simply a question of fact whether the initial and terminal points are in this State and whether there is a direct telegraph line between the two points, in good condition and in use, over which the message can be transmitted without passing through another State. If so, it is an intrastate message whether it is actually sent through another State or not.

If commerce is between two points in the same State the jurisdiction of the State over it is protected by the Federal Constitution by which jurisdiction of interstate commerce only is given to the Federal Government, and which provides that all power and authority not therein conferred is reserved to the several States. Whether commerce between two points in the same State is intrastate depends primarily upon whether both termini are in this State, and the only exception is when it is necessary to cross through the territory of another State in passing from the initial point in this State to the terminal point, also in this State. This was held by *Shepherd, C. J.*, in *Comrs. v. Telegraph Co.*, 113 N. C., 222, affirming the ruling of the Railroad Commission to that effect.

In *Leavell v. Telegraph Co.,* 116 N. C., 220, this Court affirmed the last cited case, saying: "In *R. R. Commission v. Telegraph Co. (Albea's case)*, 113 N. C., 213, the Court held that telegraphic messages transmitted by a company from and to points in this State, although traversing another State in the route, do not constitute interstate commerce and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by *Fuller, C. J.*, in *R. R. v. Pennsylvania,* 145 U. S., 192. To the same purport, *Campbell v. R. R.,* 86 Iowa, 587."

In *Bateman v. Tel. Co.,* 174 N. C., 97, the message was transmitted from Hertford, N. C., to Plymouth, N. C., and there being no direct telegraph line entirely in North Carolina from Hertford, N. C., to Plymouth, N. C., the message was necessarily sent through Norfolk, Va., and thence to Plymouth, and the Court held that if this was done in good faith it was an interstate message, but that is not the case here where there is a complete line of wire running from Greenville to Rosemary entirely in the State. The *Bateman case* did not present the anomalous situation which we have here of the message going through Weldon in this State to Richmond, Va., thence to Norfolk, Va., and thence back through Weldon, N. C., to Rosemary, N. C.

In *R. R. v. Pennsylvania*, 145 U. S., 192, it was held that transportation from one point in a State to another point in the same State but passing through part of another State could be taxed by the State, and is not a tax upon interstate commerce. This was a unanimous opinion and written by *Chief Justice Fuller.* To same effect *Sewell v. R. R.,* 119 Missouri, 222; *Campbell v. R. R.*, 86 Iowa, 587; *S. c.*, 17 L. R. A., 443. In *R. R. v. R. R. Comrs.*, 106 Fed., 253, it was held, citing the above cases, and *Comrs. v. Tel. Co.,* 113 N. C., 213, that "Where the course of transportation between two points in the same State *must be* for a considerable part of the distance through another State" it is interstate commerce. This seems to be the modification or rather interpretation of the doctrine of the three cases named. Certainly it is the only reasonable limitation.

It has also been held that where a telephone line extends into another State this does not exempt it from State control in respect to persons and service and rates for persons within the State. *Tel. Co. v. Falley,* 118 Indiana, 201; *Tel. Co. v. Bradbury,* 106 Indiana, 1, and *Hockett v. State,* 105 Indiana, 201; 31 L. R. A., 807 N.; 60 L. R. A., 646 N.

In *Tel. Co. v. Reynolds,* 100 Va., 459; *S. c.,* 93 Am. St., 971, it was held: "Where the initial and terminal points are both in the same State and the telegram is transmitted over the wires of the same company and concerns only the citizens of that State, the message is a domestic message and its character in that respect is not altered by the circumstance that the line passes in part over territory of another State, nor is it affected by the fact that the company has established a relay office in such other State. The statute deals with the company, not its agents. The company in this case undertook to transmit the message from one point to another in Virginia and it cannot escape the penalty imposed by statute for its dereliction of duty on the theory that the statute has no extra territorial effect." The same doctrine of this case was reaffirmed in *Tel. Co. v. Hughes,* 104 Va., 240, though that was subsequent to *Hanley v. R. R.,* 187 U. S., 617, in which it was held that where the continuous transportation of goods between two points in the same State passes over a "*route*" a large part of which is outside the State this is interstate commerce.

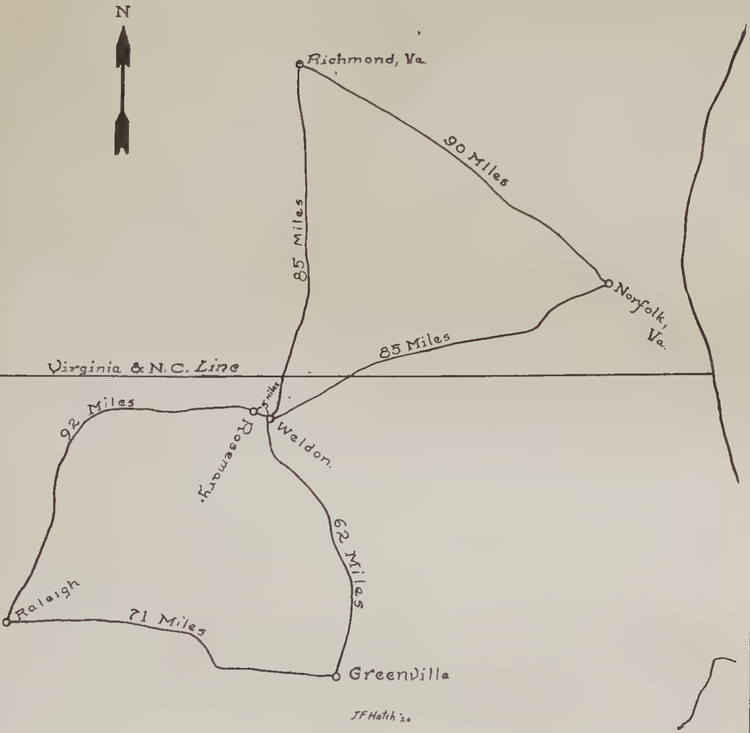
The case of *Hanley v. R. R.,* 187 U. S., 617, is not in conflict with what is said above. That merely holds that when goods were transported on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, over respondent's railroad, a direct route running by way of Spiro, Indian Territory, a total distance of 116 miles, of which 52 miles are in Arkansas and 64 miles in Indian Territory, this is interstate commerce and the State of Arkansas cannot interfere in opposition to a regulation of Congress. This case certainly does not justify the extraordinary proposition sought to be built upon it that it puts it in the power of any State or telegraph company to destroy the right of the State to regulate intrastate commerce whenever it can by any device, however unnecessary, divert transportation or transmission of a telegram through another State. It is admitted here that this message could have been sent entirely in North Carolina more directly from Greenville to Rosemary, but it is alleged that it was contrary to the defendant's business methods to do so.

In *R. R. v. Leibengood* (Kansas), 28 L. R. A. (N. S.), 985, it was held that where the line passes from one point in a State to another point in the same State, but a part of the route passes over the territory of another State, this is interstate commerce. This case (1910) has there full citation of authorities, an examination of which will show that when the route necessarily passes over the territory of another

State this is interstate commerce, but none of them hold that in a case like this where both points are in the same State, and there is a line of railroad or of telegraph between those points which can be used, that it becomes interstate commerce because the corporation sees fit to arrange its method of transportation or of transmission so as to make a wide detour through another State and then back into this State.

Most certainly we cannot concur in the proposition "But if the purpose was apparent to avoid the doctrine as to mental anguish as applied in this State and to place itself under the doctrine of the Federal courts, this alone would not be unlawful, and if such an intent could be declared contrary to law, it would not subject the defendant to liability as motive, intent, or purpose, however reprehensible, not connected with some wrongful act cannot be the subject of a civil action." It is not a question of making the defendant company indictable or liable to a civil action in transacting its business by sending it through another State and then back into this State, but whether it can by so doing oust the jurisdiction of this State over intrastate commerce which was reserved to it when in the compact at Philadelphia in 1787 the States agreed to confer upon the Federal Government jurisdiction over interstate commerce, but reserved to themselves jurisdiction over intrastate commerce and all other matters not expressly conceded to the Federal Government.

The tenth amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." The power over interstate commerce conferred on the Federal Government is in Art. I, sec. 8, clause 2, as follows: "To regulate commerce with foreign nations and among the several States, and with the Indian tribes." The line between "State's rights" and Federal rights has often been the subject of dispute, and has not yet been clearly marked and run in every particular. There is, unfortunately, still a "twilight zone," but it is beyond dispute that while the Federal Government has control over *interstate* commerce the State has never granted it control over *intrastate* commerce, and when the transaction is between two points in the same State and there is a continuous road or railroad or telegraph line between those points in good condition, capable of being used, transportation and transmission between those points cannot be made interstate commerce by the company's method of doing business, "when the purpose is apparent to avoid the doctrine as to mental anguish as applied in this State and to place itself under the doctrine of the Federal court." If such methods were permissible, the line between State's rights and Federal rights is not that drawn by the Constitution of the United



Greenville, N. C., to Rosemary, N. C., via Weldon	67 miles
Greenville, N. C., to Richmond, Va., via Weldon, N. C.,	147 miles
Richmond, Va., to Norfolk, Va.	90 miles
Norfolk, Va., to Rosemary, N. C., via Weldon, N. C.	85 miles
	322 miles

States but is nullified by the fraudulent purpose of the corporation to evade the lawful jurisdiction of the State which incorporated the defendant, gave it the right to do business here, and protects it and its officials and its property from violence. This doctrine would make the pecuniary interest of a money-making corporation supreme and the powers of the people in governing the State under its own laws (within the limits of the Federal and State Constitutions) entirely secondary to the evasive and fraudulent conduct of a private corporation. Surely the State authority cannot be made "null and of no effect" in that manner. The creature that the State has made cannot be more powerful than its creator, like another Frankenstein.

The establishment of relay offices in another State in order to evade the laws of this State, or even if only to facilitate its business, is not a "necessary part" of the transmission of the message, except to the extent that it may avoid the jurisdiction of the State court, or possibly be some economy in the transmission of the message. Certainly the defendant could not evade the 25-cent limit prescribed by the statute of this State for a message between two points and charge in lieu thereof the rate for a message from Greenville, N. C., to Richmond, Va., plus the rate from Richmond, Va., to Norfolk, plus the rate from Norfolk, Va., to Rosemary, N. C., thus making three messages out of one. This demonstrates that there is but one message in law and that is from Greenville, N. C., to Rosemary, N. C., for which the telegraph company can charge only the State limit of 25 cents for ten words, and subject to the State law for damages for negligence in the transmission of said message.

It may be that the error was made by the operator at Greenville, N. C., or by the operator at Rosemary, N. C. No one knows, but the liability of the company is the same and is not less because it saw fit to send the message by such a remarkable roundabout way. It is therefore possible and probable that in the multitudinous and circumlocutory manner of handling this message the error may have been made at some point outside the State.

Besides, the order setting aside the verdict as a matter of law was erroneous, for it found necessarily as a matter of fact that this method of sending the message out of the State, relaying it at Richmond and again at Norfolk, and then back into the State, was not for evasion, whereas the defendant having a direct, continuous line between Greenville and Rosemary, one-tenth of the distance, and requiring only one relay at Weldon, the burden was on the company to show at least that this was not done to evade the jurisdiction of the State, whose laws give damages for negligence in a case like this, from which the company is exempted if it can make this an interstate message by this device.

Moreover, the General Assembly, taking notice of this custom which the defendant has adopted, enacted chapter 175, Laws 1919, "To prohibit telegraph companies from converting intrastate messages into interstate messages," which provides that "Proof of the sending of any message from one point in this State to another point in this State shall be *prima facie* evidence that it is an intrastate message," and it was for the defendant to rebut this *prima facie* case.

There was error in setting aside the verdict. If the first issue had been material there was evidence to sustain the finding of the jury. The ground on which the court set the verdict aside and entered a nonsuit was because it held that upon the face of the evidence this was an interstate message, which we do not think was correct. But even if the finding upon the first issue was set aside, the other two issues left standing (as well as upon the finding of the first issue), the judgment should be entered in favor of the plaintiff, and the case must be remanded for that purpose.

Reversed.

E. H. RICKS v. A. P. McPHERSON.

(Filed 8 October, 1919.)

1. **Deeds and Conveyances — Timber Deeds—Period for Cutting—Reservations—Payments—Owner.**

A grantor of timber standing upon his land specified in his deed that the period for cutting and removing the timber should be five years provided the grantee, after the expiration of three years, pay to the grantor or the then owner of the land 6 per cent annually in advance upon the purchase price for the privilege of the remaining two years: *Held*, the title to the timber passed to the grantee for the five-year period, with the privilege of cutting and removing it any time within the first three years, free of further charge, and for the last two years, the privilege to be paid for each year in advance, in the amount and in the manner specified in the contract; and when this has accordingly been done, and the grantor of the timber has conveyed the land by deed expressly providing that he reserved the timber rights until a specified time, naming the date upon which the furthest period for cutting and removing the timber expired, under this reservation he retains the right to receive the amount the grantee of the timber paid under the contract though not the owner of the title to the land, as distinguished from the timber, at that time.

2. **Deeds and Conveyances—Timber Deeds—Interpretation.**

Where a grantor in a timber deed has since sold the lands upon which it was growing to another, reserving the timber for the period of time remaining in which it may be cut and removed, and a party to the action claims title to the lands through him, directly or through mesne conveyance, the deeds in the chain of title to the lands and those to the timber having the same reservation, will be construed together as a whole to ascertain the intent of the parties.

3. **Deeds and Conveyances—Timber Deeds—"Lands"—Separately Conveyed —Distinct Title.**

Timber growing upon land is held and considered to be realty or a part of the land, which may either be separately conveyed or title thereto reserved in the grantor, and where the timber has been sold to be cut, etc., within a certain period, with future payments for the continuance of the privilege to be made to the grantor or "the then owner" of the lands, who since making the timber deed has conveyed the title to the lands upon which the timber was growing, but reserving the title in the timber for the extension period under the timber deed, the position may not be maintained that as he was not "the then owner" he was not entitled to the future payments under the timber contract.

4. **Parties — Deeds and Conveyances—Timber Deeds—Lands Subdivided—Price Proportioned—Appeal and Error—Procedure.**

The plaintiff sold the timber on his lands with an extension for cutting, etc., granted, for a certain price, and afterwards sold the lands, reserving his rights under the timber deed. The purchaser of the lands divided them into lots and the defendant became a purchaser of one of them, and claimed the right to cut the timber under his grantor's deed and the conveyance to his grantor: *Held*, while ordinarily the defendant, liable only for his proportionate part, has the right to require the other purchasers of these lots to be made parties in a suit to enjoin the further cutting of the timber and to recover the amount due under the timber contract, this does not apply when such other purchasers have not resisted the plaintiff's right and have made a satisfactory settlement with him; and upon the reversal of the defendant's appeal the ascertainment of the amount due by him will be ascertained in the Superior Court and judgment entered as the legal rights of the parties may require.

5. **Deeds and Conveyances—Estoppel in Pais.**

Where the owner of lands has sold them subject to his rights under a former conveyance of the timber to receive the payments for its cutting, etc., and such appears upon the face of the conveyance, he is not estopped *in pais* to assert such rights against his grantee of the lands or a purchaser from him.

ACTION to restrain cutting of timber and to recover part of purchase price for same, heard on return to preliminary restraining order, 2 June, 1919, before his Honor, *Connor, J.*, holding the courts of the Third Judicial District; from NORTHAMPTON.

There was judgment for defendants, and plaintiffs excepted and appealed.

George C. Green and W. L. Long for plaintiffs.
Walter E. Daniel and G. E. Midyette for defendants.

HOKE, J. On the hearing it was properly made to appear that on 10 March, 1916. E. T. Zollicoffer, owning a large body of land in said county, sold and conveyed to J. W. Crew the standing timber growing thereon, the provision in reference to the timber contained in the deed being as follows:

"That the said party of the second part, his heirs and assigns, shall have five years from the date hereof in which to remove the timber hereby conveyed from the aforesaid tract of land: *Provided, however,* that he or his assigns shall, after the expiration of three years from the date hereof, pay to the said party of the first part, or the then owner of the aforesaid tract of land, 6 per centum annually, in advance, upon the amount of the purchase price aforesaid, that is, nineteen thousand dollars, for the privilege of the remaining two years in which to remove the said timber."

That on 28 March, 1916, said grantee, J. W. Crew, and wife conveyed said timber to A. C. and H. C. House, and on 6 December, 1916, said A. C. and H. C. House conveyed the same to defendant, the Greenville Manufacturing Company, the stipulations in these conveyances as to the timber rights and interests being the same as in the first deed, etc. That on 27 December, 1916, said E. T. Zollicoffer conveyed this land, on which the timber was situate, to W. L. Long. And the lands, having been in the meantime divided into several lots, on 18 January, 1918, W. L. Long and wife conveyed to plaintiffs in the action two of said lots, Nos. 12 and 14, on which the timber in controversy is situated, both of these deeds containing a stipulation that the same were made "subject to the terms and conditions of a certain timber deed executed by E. T. Zollicoffer to J. N. Crew in 1916," etc.

That on 21 September, 1918, plaintiffs conveyed one of these lots, No. 14, to Jackson Futrell, the deed containing stipulation concerning the timber thereon as follows:

"It is distinctly understood and agreed by and between the parties to these presents that this deed does not convey and pass title to three (3) acres sold to the said G. Moody, above mentioned, by Messrs. C. A. Wyche and W. L. Long, and for which they have not yet given him a deed; also all timber rights on the land herein conveyed reserved by the said parties of the first part until 10 March, 1921." And in December following lot No. 12 was conveyed to said Jackson Futrell by plaintiff with habendum: "To have and to hold the above-described piece, parcel or tract of land, together with all privileges and appurtenances thereunto belonging, save and except all standing timber and rights thereto which are herein reserved by the said parties of the first part for a period of two (2) years from 10 March, 1919, to 10 March, 1921, to the said party of the second part, his heirs and assigns, to their only use and behoof in fee simple forever." That prior to expiration of the time limit for cutting, to wit, 10 March, 1919, defendant, the lumber company, made an adjustment for privilege of further cutting, by paying to the codefendant Futrell the price for one year's extension, and was proceeding to cut the timber on these portions of the land when it was stopped by restraining order in this cause. Considering these two series of deeds together, the deeds conveying the timber interests and those affecting the general title, and seeking the true intent of the parties as expressed in their entire agreements, the approved method of construction in such cases (*Hornthal v. Howcott,* 154 N. C., 228; *Davis v. Frazier,* 150 N. C., 447), we are of opinion that the force and effect of the provisions in the timber deeds is to pass to the grantees the title to the timber for five years, with the privilege of cutting and removing the timber any time within the first three years, free of further charge, and for the last two years the privilege is to be paid for annually, in advance, 6 per cent on the purchase price of $19,000. The stipulation amounts to a positive obligation to pay for the privilege the agreed price while the timber remains on the ground and uncut, whether the same is exercised or not, i. e., 6 per cent on $19,000 in advance for the first of these two later years, and if not cut then the same amount to be due for the privilege during the last year. And the sum or sums to be paid to plaintiffs, who are the owners of the timber during the period covered by the agreement and to whom the money is due by the clear intent of the parties as expressed in their conveyances covering the property. The stipulation of the deed on 21 September being, as stated:

"It is distinctly understood and agreed by and between the parties to these presents that this deed does not convey and pass title to three (3) acres sold to the said G. Moody, above mentioned, by Messrs. C. A. Wyche and W. L. Long, and for which they have not yet given him a deed; also all timber rights on the land herein conveyed reserved by the said parties of the first part until 10 March, 1921."

And that of 31 December being:

"To have and to hold the above described piece, parcel or tract of land, together with all privileges and appurtenances thereunto belonging, save and except all standing timber and rights thereto which are herein reserved by the said parties of the first part for a period of two (2) years from 10 March, 1919, to 10 March, 1921, to the said party of the second part, his heirs and assigns, to their only use and behoof in fee simple forever."

These important provisions of the contract would to our minds be entirely without significance unless they except the title to the timber until 10 March, 1921, and reserve to the grantors during that period the payment of the purchase price. The question is, we think, virtually decided in *Powell v. Lumber Co.*, 163 N. C., 36. In that case Mary E. Sumner, owner of the land, in July, 1901, sold the timber thereon to one W. W. Cummer, with right to remove same for ten years and with an extension privilege of five years.

In November following she sold the land to other parties "excepting the timber sold by Mary E. Sumner on said land and by her conveyed to W. W. Cummer by deed," etc. Subject to these exceptions and under mesne conveyances the land was acquired and held by plaintiff Powell. Prior to expiration of ten years Mary E. Sumner sold and conveyed to assignee of Cummer the timber for the extension period, and it held that she had the right to dispose of the timber for the renewal period and to recover the amount which had been agreed upon as the consideration for same. As shown in the opinion referred to, the decision of *Hornthal v. Howcott,* 154 N. C., 228, to which reference has been made by defendants' counsel, involved only the right of the parties after the period specified for cutting had terminated, and the question as to who could rightfully collect the purchase under the terms of the contract was in no way presented. It was earnestly insisted for the defendant that in the contract creating the timber interest it is specified that the payment for the last two years is to be made to the *then* owner of the land, and that the lumber company having made satisfactory arrangements with its codefendant Futrell, who then held the title, thereby acquired the legal right to proceed under the contract. The term *land* is one of very comprehensive significance. As said by my *Lord Coke,* "It includes not only the ground or soil but everything which is attached to the earth, whether by the cause of nature, such as trees, herbage and water, or by the hand of man, as houses or other buildings, and it has an indefinite extent, upwards as well as downwards, so as to include everything terrestrial under or on it." And we have uniformly held in this jurisdiction that standing timber is realty and subject to the laws of division and transfer appertaining to that kind of property. In September and December, 1918, McPherson and Ricks, the grantors in the deeds to Futrell, were the owners of the lands and the standing timber thereon which constituted part of it. As such owners they had the perfect right to control it and to grant a part of the property to one and reserve a portion to themselves. Having therefore excepted that part of the land consisting of this standing timber, and in terms which clearly imputed a right to receive the purchase money for the same during the period covered by the contract, we see no reason why this exemption should not be given effect and the grantee Futrell be conclusively bound by it. *Herring v. Lumber Co.,* 163 N. C., 481.

On the record there can be no claim that the lumber company has been imposed upon or that the facts present a case for an estoppel *in* *pais.* The terms of the instruments upon which plaintiffs rely appear upon the face of the conveyances and ordinary care would have sufficed to fully inform and protect the company, and in such case they could acquire no more than their grantor Futrell himself owned; that is, the land except the standing timber during the life of the contract. True, in *Lumber Co. v. Wells*, 171 N. C., 262, the Court held that in case of an option for an extension period the purchase money would be due and owing to him who held the title at the time the same was due and payable, but it appeared also as the approved limitation on the principle, "unless there was a contrary provision in the deed itself." Here there is a contrary provision in the deed, to wit, a clause excepting the standing timber till 10 March, 1921, and in terms as stated reserving to the grantor the right to collect the purchase money for the extension period, being interest on $19,000.

It will be noted that only a portion of the land was acquired by plaintiffs and conveyed by them to Futrell, and therefore they could only recover their due proportion of the purchase money. Ordinarily the defendants would have the right to require that all the owners of the land be made parties, but inasmuch as it appears that the timber on all the other parts of the land has been cut and the rights concerning the same satisfactorily adjusted, there is no reason why the present suit should not proceed as now constituted and the rights of the parties thereon determined.

This will be certified that the proportionate amount of the purchase money, i. e., the interest as stated presently due plaintiffs, be ascertained. That defendants meantime be restrained until the same is paid and on sufficient bond given to assure payment of plaintiff's reasonable recovery and costs and such further proceedings had as the legal rights of the parties may require.

Reversed.

D. C. McCOTTER v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 8 October, 1919.)

1. **Carriers of Goods—"Order, Notify"—Title—Consignors—Disposition of Goods.**

   Ordinarily the consignor of a shipment by common carrier of goods, "to order of consignor, notify," retains the title sufficiently to control the route, destination and delivery, unless he has by assignment of the bill of lading or contract for value creating an interest in the goods deprived himself of his rights over them.

2. **Evidence—Nonsuit—Trials.**

   Upon a motion to nonsuit, the testimony in support of plaintiff's claim must be taken as true and construed in the light most favorable to him.

3. **Carriers of Goods—Commerce—Production of Bill of Lading—Waiver—Negligence—Connecting Carriers—Carmack Amendment.**

The delivering carrier of a shipment by interstate carriage refused delivery to the person designated on account of his failure to produce the bill of lading, which had been mislaid or lost, and the goods were thereby damaged. There was evidence tending to show that the consignor arranged with the initial carrier for delivery without requiring the production of the bill of lading, which promptly informed the delivering carrier by telegram before the damages complained of had occurred: *Held*, the delivering carrier was not exonerated by the mere failure of the consignee to produce the bill of lading under the evidence if found as facts by the jury, and a motion as of nonsuit against the initial carrier was properly denied, such carrier being responsible for the acts of the delivering carrier under the Carmack and like amendments to the Interstate Commerce Act.

4. **Carriers of Goods—Evidence—Negligence—Nonsuit.**

Where there is evidence tending to show that the negligent delay of the carrier in transmitting or delivering a consignment of potatoes caused the shipment to be ruined by cold weather, a motion as of nonsuit on the evidence by the carrier, in an action against it for damages, will be denied.

5. **Carriers of Goods — Bills of Lading—Negligence—Damages—Claims—Statute—Interstate Commerce.**

A statement given by the consignee by the delivering carrier of the interstate shipment, within the statutory ninety days, giving full notice of the claim, showing the amount, nature and value of the shipment, the date and address, the car in which the goods were sent, its arrival at destination and the condition of the goods, is a sufficient compliance with the requirements of the bill of lading as to notice of the claim.

6. **Carriers of Goods — Transportation—Negligence—Claims—Notice—Conditions Precedent.**

Where damages are caused to a shipment of goods by the negligence of the carrier in their transportation and delivery, no notice to or claim on the carrier for such damages shall be required as a condition precedent to the recovery therefor.

ACTION to recover damages for loss caused by negligent delay in shipment and delivery of a lot of potatoes from Bayboro, N. C., to Roanoke, Va. The goods shipped by plaintiff to his own order, notify Roanoke Fruit Company, etc., on 12 December, 1914. The shipment was routed over Norfolk and Western, in State of Virginia, the defendant being the initial carrier, receiving the shipment at Bayboro as stated. On denial of liability the jury rendered the following verdict:

1. Did the plaintiff on or about 12 December, 1914, deliver to defendant at Bayboro, N. C., 105 barrels of sweet potatoes in good condition to be safely transported and delivered within a reasonable time over said railroad and its connecting carriers to consignee or agent, Roanoke, Va.? Answer: "Yes."

2. If so, did defendant negligently fail to transport and deliver said potatoes within a reasonable time and thereby damage plaintiff, as alleged? Answer: "Yes."

3. If so, what damage, if any, is plaintiff entitled to recover? Answer: "$189.90 at 6 per cent from 30 December, 1914, to date."

4. Did plaintiff file notice of claim as required by the bill of lading? Answer: "Yes."

Judgment on verdict for plaintiff, and defendant excepted and appealed.

D. L. Ward and Z. V. Rawls for plaintiff.
Moore & Dunn for defendant.

Hoke, J. There was evidence on part of plaintiff tending to show that the potatoes delivered for shipment to the defendant road at Bayboro, N. C., on 12 December, 1914, and routed via Norfolk and thence over Norfolk and Western to Roanoke, Va., and arrived at this point on 17 December following. That owing to the fact that the bill of lading was lost or delayed in the mails, the delivering carrier refused to turn over the goods without presentation of a bill of lading or a bond of indemnity and did not do so until 23 December. That the weather was mild at the time the potatoes were shipped and continued so until 17 December, when it turned very cold and continued to be freezing weather for several days thereafter, and owing to the delay in delivery of potatoes the same were frozen and became worthless. That on arrival of potatoes at Roanoke they were applied for by the American Brokerage Company, acting at Roanoke for the shipper, and delivery being refused for want of bill of lading, the brokerage company wired that no bill of lading had been received, etc., and had a message in reply that the defendant road had been requested to notify the Norfolk and Western to deliver without bill of lading. There was further evidence tending to show that on receipt of message from his brokers plaintiff saw agent of defendant road and requested it to notify the Norfolk and Western by telegram to deliver without bill of lading and that shipper had offered bond of indemnity. That said shipper offered a bond to defendant's agent and was told that his standing was well known and that he need not give a bond. There were also facts in evidence to the effect that this message was received by the Norfolk and Western on 17 December, and further, that the brokerage company, in renewing its demand for the potatoes, informed the agent of the delivering carrier that the message directing delivery without a bill of lading had been forwarded by the defendant road at request of the owner. The testimony on the part of defendant tended to show that the message from the initial carrier directing delivery without presentation of bill of lading was not received till 23 December, at which time potatoes were forthwith surrendered to shipper's agent and without bond. On these, the facts more directly pertinent to the issue, it was urged for error that the court refused to allow defendant's motion for a nonsuit and this for the reason, chiefly, that the delivering carrier was not required to surrender potatoes without presentation and surrender of the bill of lading, but on the record we are of opinion that the position cannot be maintained. Not only is it the accepted rule on a motion of this kind that the testimony in support of plaintiff's claim must be taken as true and construed in the light most favorable to him, but it appears from a perusal of his Honor's charge on the third issue that, in this aspect of the case, the jury have necessarily determined that the message from defendant directing delivery without the bill of lading was received in Norfolk on 17 December, and in such case, in refusing delivery, we concur in the opinion of the lower court that a breach of duty has been properly established on the part of the Norfolk and Western and for which defendant may be held liable under the Carmack and subsequent amendments to the Interstate Commerce Act. *Paper Box Co. v. Ry.*, 177 N. C., 351, and cases cited; *Mann v. Transportation Co.*, 176 N. C., 104.

In a shipment of the kind presented here, "to order of consignor, notify," the title to the goods remains in the shipper, and ordinarily he has the control of same as to route, destination and delivery unless he has, by assignment of the bill of lading or other contract for value creating an interest in the goods, deprived himself of his rights over them. In Hutchison on Carriers, sec. 193, the position is stated as follows: "When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee and vest the property in him, the shipper may, even after the delivery to the carrier and after the bill of lading has been signed and delivered, or after the goods have passed from the possession of the initial carrier into that of a succeeding one, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named or to some one for his use." A principle very generally recognized and approved and applied with us in *Richardson and Produce Co. v. Woodruff & Son* at present term; *Myers v. R. R.*, 171 N. C., 190; *Development Co. v. R. R.*, 147 N. C., 506, and other cases.

On the facts presented, therefore, a failure to deliver the potatoes to the owner or his agent on a telegraphic message from the initial carrier directing that this be done without presentation of the bill of lading, made at the request of the owner and consignor in the bill of lading, would be sufficient to sustain the verdict on the issue, and in this connection it may be well to note that when such consignor requested that the message be sent he offered to give a bond of indemnity and was told that no such bond would be required.

In no event would an order of nonsuit be justified, there being additional evidence on the part of plaintiff tending to show that the time actually taken for the shipment from 12 December to 17 was too long, and in itself might reasonably have caused the injury complained of.

It was further contended that no recovery should be allowed because no claim was filed within the time required by the terms of the contract. Stipulations of this kind, when reasonable, have been approved by us in cases coming under the laws of this jurisdiction. *Culbreth v. R. R.,* 169 N. C., 725. And in interstate shipments are expressly recognized by the statute when not for a shorter period than ninety days. It appears, however, that on 29 December, 1914, the same month when the loss occurred, the plaintiff's broker in Roanoke, acting for plaintiff, filed with the delivering carrier a full notice of claim, showing the amount, nature and value of the shipment, the date and address, the car in which the goods were sent, the time it arrived at Roanoke, and the condition of the goods. It would seem to be a full compliance with the requirement of the contract "that the claim be presented at the point of delivery or point of origin within four months. Apart from this the verdict having established that the loss was caused by negligence in shipment and delivery of goods, the statute applicable (*Mann v. Transportation Co., supra*), provides that no notice or claim shall be required as a condition precedent to recovery.

On careful consideration of the record we have found no error to defendant's prejudice, and the judgment of the Superior Court is affirmed.

No error.

DENA MORTON, GUARDIAN OF ERNEST LOYD AND JUNIE LOYD, v. PINE LUMBER COMPANY.

(Filed 8 October, 1919.)

1. **Deeds and Conveyances — Timber — Real Estate—Cutting Period—Defeasible Fee.**

Timber standing and growing upon lands is realty, and subject to the same laws of devolution and transfer; and deeds to such timber, stating a period of time in which the timber may be cut and removed by the grantee, conveys an estate of absolute ownership accordingly, defeasible as to all timber conveyed which has not been cut and removed within the specified time.

2. **Same—Extension—Option—Interest—Contracts.**

Stipulations in a deed conveying timber standing and growing upon lands for the cutting and removing of the timber beyond the period stated therefor in the conveyance, upon the payment of an agreed sum or price, are in the nature of options and do not in themselves create any interest in the timber, but amount only to an offer to create such interest when the conditions are performed, working a forfeiture when not strictly complied with.

3. **Same—Descent and Distribution—Heirs at Law—Payments.**

The title to timber standing and growing upon lands descends at the owner's death to his heirs at law, and where he had conveyed the timber his heirs at law are entitled to the payment required of the grantee for an extension of the time allowed him for cutting and removing the timber beyond the original period stated in the conveyance, and when such payment has not either been made or tendered in the time stipulated for, the grantee loses all the rights he would otherwise have had under the terms of his deed.

4. **Same—Widow—Dower.**

Where it appears that the husband was the owner of the lands, and his wife has joined in the conveyance of the timber thereon, and is named as one of the parties of the first part in the granting clauses, this, *prima facie*, should only serve to pass her rights appertaining to her as the wife of the owner, and a payment by the grantee for the privilege of an extension of the right to cut, etc., the timber beyond the original period named, after the death of the owner, should be made to the heirs at law to be enforceable, and not to his widow, especially before the allotment of her dower has been made.

5. **Deeds and Conveyances—Timber—Option—Payment—Deceased Owner—Heirs—Receipt—Guardian.**

Where a grantee of timber relies upon a payment of the stipulated amount to acquire an extension of the period for cutting and removing the timber, made after the death of the owner, to the guardian or his minor children, his heirs at law, it is necessary for the sufficiency of such payment that proper proceedings shall have been had under the statutes Rev., secs. 1800, 1798, 1788 and 1789, which require the supervision of the court, in a prescribed way, for the disposition by the guardian of his wards' estate, and a payment or tender made to the guardian otherwise is ineffectual.

6. **Descent and Distribution—Heirs—Title—Possession—Dower.**

The possession and the right thereto of the lands of a deceased owner, dying intestate, is in his heirs at law, before the dower of his widow has been allotted therein.

7. **Injunction—Deeds and Conveyances—Timber—Deceased Owner—Option—Payment—Heirs.**

An injunction against the grantee of standing timber should be made permanent when it is properly established that he is cutting the timber from the lands after the death of the owner, and has failed to pay to the heirs at law, entitled to receive it, a stipulated price for an extension period, under which he claims the right.

ALLEN, J., dissenting.

ACTION to restrain cutting of timber and for damages, determined on final hearing before *Guion, J.*, at April Term, 1919, of ONSLOW.

The court was of the opinion that on the pleadings and exhibits made in the cause plaintiffs had shown no right to relief, and thereupon adjudged that defendants go without day. Plaintiffs excepted and appealed.

Duffy & Day, E. M. Koonce and Cowper, Whitaker & Allen for plaintiff.

Frank Thompson and L. R. Varser for defendant.

HOKE, J. On the hearing it appeared that on 8 April, 1905, John Loyd, owner, with his wife, in consideration of $30, conveyed to the Swansboro Lumber Company the timber of every description of 12 inches and upward standing and growing upon three tracts of land aggregating 103 acres, with right to cut same at any time within ten years from date of the deed, with the privilege of renewal for ten years on request of grantee, etc., and on payment of $10 annually for said period. For the same consideration for like period the right to build all necessary tracks and tramways, etc., was also conveyed with privilege of cutting any timber under said size to be used in construction. In same deed there was also conveyed a permanent right of way for a railroad 60 feet wide over said land, and with the stipulation that the owner should not cut during these periods any timber from said land under the size, 12 inches, except what was necessarily required for fencing; and further, that the parties of the first part should pay all taxes and assessments upon said land and timber so long as the contract should remain in force, etc. That soon after the execution of this deed and contract John Loyd, the owner, died, leaving him surviving his widow, Dena (now intermarried with Gardock Morton), and two children, plaintiffs in this suit, Ernest Loyd and Junie Loyd, who were then and are now infants. That nothing further was done under the contract until 6 April, 1915, when the Swansboro Lumber Company, grantee in the deed, paid to Dena Morton $10 and took a written receipt therefor signed by said Dena and her then husband, Gardock Morton, specifying that the same was in payment for one year's extension on the timber deed of Mr. Lloyd and wife. And thereafter, to wit, on 25 March, 1916, the Swansboro Lumber Company, having conveyed their interest to the Pine Lumber Company, and Dena Morton having meantime qualified as guardian of plaintiffs, the said Pine Lumber Company paid to said guardian $50 and took a written receipt therefor specifying that same was a payment in full for five years extension for the right and privilege of cutting said timber.

It appeared further that the said Pine Lumber Company were preparing and intended to cut the timber from said land, claiming that they had the legal right to do so under their deed from the Swansboro Lumber Company and by virtue of the payments referred to.

In a recent case before the Court, *Lumber Co. v. Wells,* it was said to be the correct deduction from many of our decisions on the subject "That standing lumber is realty," subject to the laws of devolution and transfer applicable to that kind of property, and that lumber deeds such as this convey an estate of absolute ownership defeasible as to all timber not cut and removed within the specified period, citing *Williams v. Parsons,* 167 N. C., 529; *Midyette v. Grubbs,* 145 N. C., 85; *Lumber Co. v. Corey,* 140 N. C., 462.

And further, that stipulations for an extension of time are in the nature of options, and that they do not in themselves create any interest in the property but amount only to an offer to create such interest when the conditions are performed and working a forfeiture when not strictly complied with, citing *Waterman v. Banks,* 144 U. S., 394; *Thacker v. Weston,* 197 Mass., 143, and other cases. And again, that "where the time first provided for in a deed of this character has passed and it becomes necessary for the grantee to hold by reason of performance of the stipulation for extension that this estate or interest arises at the time the conditions are complied with, and in the absence of any provision in his deed to the contrary the price paid belongs to him who then has the estate, and from whose ownership the interest is then created. The option or privilege obtained to the extent of the right conferred is a contract attendant on the title. and as stated, unless otherwise provided in the deed conveying the title, the price for the interest in the proper performance of the conditions will inure to the owner. It is from his estate that this interest passes and he must receive the purchase price."

In further illustration of the principle it was held in another case in the same volume, *Carolina Timber Co. v. Bryan,* 171 N. C., 265, that when the owner has died, during the first period, nothing else appearing, the title descended to the heirs and that they and not the executor are entitled to receive the purchase money.

On the facts presented and a proper application of these principles approved in *Mizell v. Lumber Co.,* 174 N. C., 68, and many other cases, we are of opinion that the restraining orders heretofore issued in the cause should be made permanent and defendants perpetually enjoined from any further cutting of timber. On the death of John Loyd, the owner, the land descended to the infant plaintiffs, his children and heirs at law, and on the record there is no valid claim or suggestion that any tender of the extension money was ever made to them within the time required for the first payment nor to any one having lawful right to create or convey a permanent interest in their property.

Until dower is allotted the possession and the right thereto was in the heirs, and the widow as such had no power to bind them in any way concerning it. *Fishel v. Browning,* 145 N. C., 71. The payment of the money to the widow, therefore, for the first year's extension just two days before the time limit had expired could not affect their interest, and there being no other payment within that time for the first year's extension, this of itself would work a forfeiture, for these contracts as stated are to be strictly construed, and the agreement requires that the extension money should be paid or properly tendered year by year. *Eureka Lumber Co. v. Whitley,* 163 N. C., 47; *Rountree v. Cohn-Bock Co.,* 158 N. C., 153; *Bateman v. Lumber Co.,* 154 N. C., 248; *Product Co. v. Dunn,* 142 N. C., 471. And if it were open to consideration the attempted payment to the guardian is equally without effect. This being for the five years following the first year. A perusal of our statutes on the subject will show that the power of a guardian to make disposition of his ward's real estate is very carefully regulated and a sale is not allowed except on petition filed, and the order must in all cases have the supervision and approval of the judge. Rev., secs. 1800, 1798, 1788, 1789. And this tender which, as we have seen, when rightly made serves frequently to create or convey an interest in the real estate of the infant ward, could not be sanctioned or made effective by the mere receipt of the guardian but would require a court proceeding where the ward's interest could be supervised and cared for, as the law contemplates and directs. *LeRoy v. Jacobosky,* 136 N. C., 443. An examination of the present contract affords us apt instance and illustration of the wisdom of the provisions of our law on the subject. The suggestion that by the terms of the deed the wife could receive the extension money as one of the grantors of the deed is without merit. It being made to appear that the land belonged to her deceased husband, if her name is included in the "granting clauses of the deed as one of the parties of the first part," this, *prima facie,* should only serve to pass the rights appertaining to her as wife of the owner, her inchoate right of dower, etc., and beyond that would be regarded as a mere formality. And even since the Martin Act empowering the wife to contract and deal as if she were a *feme sole* (Laws 1911, ch. 109), the covenants and stipulations in such a deed should not be allowed to affect her except to the extent of her interest, and would give her no power to bind the owners of the inheritance unless otherwise clearly and plainly expressed in the instrument. *Coble v. Barringer,* 171 N. C., 445; 13 R. C. L., pp. 1325-26; 2 Develin on Deeds, sec. 955.

There is error, and this will be certified that a judgment for permanent injunction be entered.

Reversed.

ALLEN, J., dissenting: I do not agree to the disposition of this case, because there was no one in being at the time of the expiration of the time for cutting the timber to whom the money for the extension could be paid, as the title had descended to infants without guardian, and the money was paid to the guardian as soon as one was appointed and before one year of the extension period had expired.

I also think, in any event, provision ought to be made for the return of the amount paid to the guardian.

W. D. STEPHENSON v. CITY OF RALEIGH.

(Filed 8 October, 1919.)

Trials—Remarks of Court—Improper Remarks—Appeal and Error—Instructions—Error Cured—Harmless Error—Courts—Attorney and Client.

Where a witness is being cross-examined to show a contradiction between his testimony and an allegation in his sworn complaint, a remark by the court to the examining attorney, in the presence of the jury, "you are just quibbling over that," will not alone be construed as such reflection on counsel as to prejudice his standing or his case before the jury; and were it otherwise, the error would be cured by the judge referring specifically to it in his charge, and instructing the jury it was not so intended by him, and for them not to consider it. The duty of the courts and attorneys not to uselessly consume time in the trial of causes, pointed out and discussed by CLARK, C. J.

APPEAL by plaintiff from *Allen, J.*, at January Term, 1919, of WAKE.

This was an action for the recovery of damages for personal injuries alleged to have been caused by the negligence of the defendant in failing to keep a walkway habitually used for the public in a reasonably safe condition. Verdict and judgment for defendant. Appeal by plaintiff.

Douglass & Douglass for plaintiff.
John W. Hinsdale, Jr., for defendant.

CLARK, C. J. James I. Johnson, mayor of Raleigh, testified to the ordinance, which was put in evidence, forbidding any person to use the grass plats in any of the city parks for walkways and prohibiting any new carriage or walkways to be made in any city park except by the approval of the board of aldermen. The plaintiff's counsel asked the witness the following questions: "You swore to the answer in this case? A. Yes. Q. Do you swear positively that she did not get hurt? A. No. Q. Do you admit that she did get hurt? A. No. I swore to that on information and belief. Q. Who informed you that she was not hurt?

A. I assumed it as a whole. I deny that the hole was left there negligently by the city. Q. How came you to admit that she walked and denied she fell? A. Because I had been notified that she had walked there, and I deny that there was a dangerous hole there and that she was hurt. Q. Why didn't you admit that she fell there?"

At this stage of the cross-examination his Honor stated, in the presence of the jury, "You are just quibbling over that." The plaintiff excepted to this statement of the court.

We cannot see that the remark was any such reflection on counsel as to prejudice his standing or his case before the jury. The judge was simply calling to his attention that he was taking up the public time in asking irrelevant and unnecessary questions. There have been rare occasions in which the trial judge has made remarks which seemed to be a serious reflection upon the counsel and on appeal to this Court we have in such cases granted a new trial, as in *Perry v. Perry,* 144 N. C., 329, which was cited and approved; *Bank v. McArthur,* 168 N. C., 53, and other cases there cited. These cases hold "Any remarks by the presiding judge made in the presence of the jury which have a tendency to prejudice their minds against the unsuccessful party will afford ground for the reversal of the judgment."

The presiding judges should be and usually are very careful to use no expression that will be disparaging to counsel, or any intimation of opinion upon the merits of the case then on trial. On the other hand, counsel should not unnecessarily consume the time of the court on irrelevant matters, and when this is being done the judge should restrict counsel to the matter in hand. We see in the words excepted to no reflection upon counsel or prejudice to the cause he was representing and nothing more than an effort to restrict the investigation to matters really pertinent to the trial.

Besides the courteous gentleman, who was the presiding judge on this occasion, used the following language in his charge: "I want to retract one word or remark which I used when the counsel was examining Mr. Johnson and I interrupted and I said it was quibbling. I should not have used that word. I only meant that they were contending about a matter of pleadings and that it was, to my mind, not throwing any light on the question that we were trying, and I therefore made the remark, and I only meant that it was a contention between counsel about pleadings and I did not intend to intimate anything about the merits of the case, and I will ask you to dismiss that from your mind."

Even if the remark had been objectionable and capable of the construction that it was prejudicial this would have cured it, except, possibly, where there has been a serious abuse of the powers of the court.

The Court has held in numerous cases that error in the admission of improper evidence is cured where it is afterwards withdrawn and the jury instructed to disregard it. *Ellison v. Tel. Co.,* 163 N. C., 5; *Harrison v. Tel. Co., ib.,* 17; *Toole v. Toole,* 112 N. C., 152; *Gilbert v. James,* 86 N. C., 245; *McAllister v. McAllister,* 34 N. C., 184.

For a stronger reason, when a remark of a judge has been made which might seem improper the error can be cured, if erroneous, by the same instruction to the jury and its express retraction as in this case.

Justice John H. Clarke, now of the U. S. Supreme Court, then U. S. district judge in Ohio, in the course of a written opinion said: "This Court cannot refrain from observing in this connection that the old notion that a suit at law or in equity is *chiefly a game,* affording an opportunity for the matching of wits of counsel and for the exercise of the ingenuity of courts, is fast giving place to the conception that suits, both at law and in equity, should be sincere and candid attempts to reach the real points of difference between the parties to them, and to secure a just settlement of such difference." *Coulston v. Steel Range Co.,* 221 Fed., 669, 672.

As was said by this Court some years ago, a trial is a solemn, serious investigation of the matters in controversy with the sole object of ascertaining the truth of the facts at issue and the application of the law in the interests of justice; "It is not a game in which the object is to catch the judge out on first base." *Wilson v. Mfg. Co.,* 120 N. C., 96. Trivial matters should be excluded by the trial judge, and in so doing there is no ground for reversal on appeal.

The other exceptions raised do not require any discussion.

No error.

COMMISSIONERS OF SURRY COUNTY v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 8 October, 1919.)

1. **Constitutional Law—Counties—Roads and Highways—Taxation—Bonds—Special Statutes.**

   An act of the Legislature authorizing the issuance of county bonds for public roads is not in contravention of the Constitution, sec. 29, Art. II, prohibiting the passage of "any local, private or special act authorizing the laying out, opening, altering, maintaining or discontinuing highways."

2. **Constitutional Law — Taxation — Counties — Townships — Exchange of Bonds.**

   The Legislature authorized a county to issue $500,000 of its bonds for the roads therein, $349,000 of which for exchange for township bonds theretofore issued by the townships for their own road purposes if it can be arranged, but if the holders should refuse to accept the exchange the issuance of the county bonds to be reduced to that extent: *Held,* the validity of the county bonds is not affected by this provision, especially as to the remaining $151,000 of bonds to be directly sold; or, as to them, by a further provision requiring notice to be given to the holders of the township bonds.

3. **Constitutional Law—Counties—Roads and Highways—Taxation—Bonds —Mandamus.**

A limitation in an act authorizing a county to issue bonds for road purposes, to 40 cents on the $100 and $1.20 per poll for a sinking fund, interest, etc., will be presumed as sufficient; but if otherwise the validity or constitutionality of the bonds would not be affected, the remedy being by *mandamus* to apply the proceeds of the levy to the payment of interest and maintenance, leaving the principal of the bonds to be provided for at maturity.

4. **Constitutional Law—Counties—Roads and Highways—Taxation—Limitation—Statutes.**

County bonds for road purposes are for a "necessary expense," and if the levy of a tax therefor provided in the act should be found insufficient, taxes therefor can be levied under the general statutes, authorizing counties to construct roads and bridges. Ch. 103, Laws 1917, amended by ch. 185, Laws 1919.

5. **Constitutional Law—Taxation—Limitations—Counties—Roads and Highways—Statutes.**

The approval of the Legislature to the county levying a tax for road purposes in excess of the constitutional limitation may be given by a general act giving an option to any county to avail itself thereof.

6. **Constitutional Law — Counties—Roads and Highways—Taxation—Bonds —Sales—Advertisement—Notice—Statutes.**

Where the statute for the issuance of county bonds for road purposes provides that previous advertisement of notice for the sale of these bonds shall be given for thirty days, an advertisement for once a week, beginning more than thirty days before the sale, is a compliance with the statute; and were it otherwise, in this case, the general statute later passed at the same session of the Legislature, permitting the sale of such bonds by the commissioners at public or private sale, removes the requirement as to notice.

7. **Counties — Roads and Highways—Taxation—Bonds—Statutes—Requirements—"Callable"—"Optional."**

The requirements of the general statute authorizing a county to issue bonds, etc., for its road purposes, that if the bonds to be issued are "callable" or "optional" it shall so be expressed upon their face, does not apply to bonds not stating such provision upon their face, nor does it apply to bonds issued under a local law applicable to a county which does not contain this restriction.

APPEAL by defendant from *McElroy, J.*, at Chambers, 8 September, 1919; from SURRY.

This is a controversy submitted upon an agreed statement of facts without action, in regard to $151,000 of Surry County road bonds which were awarded to the defendant at its bid of par and accrued interest, this bid being the highest bid submitted pursuant to the published notice of sale. The defendant afterwards declined to take the bonds, alleging they were unconstitutional. The court sustained the validity of the bonds, and defendant appealed.

Carter & Carter, E. M. Linville and Wm. Henry Hoyt for plaintiff.
Manly, Hendren & Womble for defendant.

CLARK, C. J. On 3 March, 1919, the General Assembly ratified ch. 235, Public-Local Laws 1919, entitled "An act to create a highway commission for Surry County for the improvement of the public roads." This act created the Highway Commission of Surry County and among other provisions authorized, in sections 21, 22 and 23, the issuance of $500,000 of "Surry County good roads bonds" to be made payable at such times as the board of county commissioners may designate, not exceeding thirty years, and bearing interest not exceeding 5 per cent per annum, payable semi-annually, to carry out the purposes of the act. Section 22 provided that for the creation of a sinking fund for the payment of the bonds and for the payment of interest thereon, and for maintenance of the said roads, the county commissioners should annually levy taxes "not to exceed 40 cents on the $100 and not exceeding $1.20 on the poll."

The defendants attack the constitutionality of this act upon two grounds:

1. That the act was passed in violation of sec. 29, Art. II, of the Constitution, which prohibits the passage of "any local, private or special act . . . authorizing the laying out, opening, altering, maintaining or discontinuing of highways." This objection has been fully discussed and similar acts to this held constitutional in *Brown v. Comrs.,* 173 N. C., 598, which was approved and affirmed in *Mills v. Comrs.,* 175 N. C., 215, and reaffirmed at this term in *Martin v. Trust Co.* and *Davis v. Harris.* It is unnecessary to repeat what has been so fully discussed and so recently decided. We can add nothing thereto.

2. The defendant further contends that section 24 of the act before us is unconstitutional. That section provides that $349,000 of this issue of $500,000 of bonds authorized by this act may be used to retire certain township bonds of said county which have been issued for road purposes in exchange for said township bonds if this can be arranged, but that if the holders of said township bonds or any of them refuse to

accept these county bonds in exchange, then the issue of county bonds under this act shall be reduced to that extent.

We do not see that the defendant, who has purchased and is to receive the other $151,000 of this bond issue, is at all concerned in the validity of the $349,000 of bonds to be issued in exchange for the township bonds. But as the question is presented, it may be well to state that this provision is an almost exact copy of similar provisions in the act in regard to Person County which was held valid in *Wagstaff v. Highway Commission,* 174 N. C., 377, and which we reaffirm.

The object of this provision is to equalize the burden by relieving the townships, which have already issued bonds for this purpose, by substituting county bonds to the same extent by exchange with the holders of said township bonds, and where this cannot be done, by abating the proposed issue of $500,000 to the extent that said township bonds cannot be retired by exchange with the holders thereof. The object of the statute is as far as possible to make this road system a county and not a township burden. The cases of *Bladen v. Boring,* 175 N. C., 105, and *Johnston v. State Treasurer,* 174 N. C., 141, cited by the defendant, have no application to the provisions of this statute.

The defendant further attacks the validity of the bonds and their issue by the county commissioners because of the limitation in the act of the levy to 40 cents on $100 and $1.20 per poll to create a sinking fund for the ultimate payment of the bonds, for the payment of interest and for the maintenance of the roads. There is no evidence or finding of fact that it will be insufficient for that purpose, and it is to be presumed that those who drafted the act made an estimate whether the sum which would be raised by such levy would be sufficient, as it doubtless will be, in view of the steadily increasing wealth of Surry County and the policy of revaluation of property at its full value which has been adopted by the State. But if it should prove insufficient this in no wise affects the constitutionality of the bonds or their validity in any respect. The defendant purchased with full notice of that provision in the act, and the bonds in any view will be a valid obligation of the county of Surry. The defendant, if there arose a possibility of this not raising a sufficient amount, could proceed by *mandamus* to compel the application of the proceeds of the levy to the payment, first, of interest and maintenance and a corresponding reduction in the sinking fund if necessary, leaving the principal of the bonds to be provided for at maturity if the sinking fund is not sufficient, since the indebtedness in any event is a valid obligation of the county.

The bonds being issued for a necessary expense, "sufficient" taxes can be levied under the general statute authorizing counties to construct roads and bridges. Ch. 103, Laws 1917, amended by ch. 185, Laws 1919. *Martin v. Trust Co.,* at this term.

The objection that permission to levy taxes in excess of the constitutional limitation can be granted under Art. V, sec. 6, only by "special approval" of the General Assembly, and that by the decision in *R. R. v. Cherokee,* 177 N. C., 86, it was held that such approval could not be given by a general act, was fully met by the decisions in *Parvin v. Comrs.,* 177 N. C., 508, and *Martin v. Trust Co.,* at this term, which held that "special approval" is not required to be given by a "special act" restricted to a single county, but may be by general statute giving an option to any county which shall see fit to avail itself of such permission. In *Parvin v. Comrs., R. R. v. Cherokee* was distinguished.

The defendant further contends that section 24 required, by implication, that notice shall be issued to the holders of township bonds to give them an opportunity to exchange them for county bonds, and that it does not appear that this was done. This in no wise concerns this defendant, for these $151,000 of bonds are not a part of the $349,000 to be used for the exchange with the holders of township bonds.

Publication of the notice of sale of these bonds was made "once a week for five successive weeks, beginning more than thirty days before the sale of the bonds." This is sufficient advertisement "for thirty days" as required by section 23 of the act. We know of no precedent or reasoning that can sustain the objection on this ground. We presume that it was put in *ex abundantia cautela.* Besides, the express grant of power in the general act to sell bonds "at public or private sale as the board of commissioners may determine," in sec. 6, ch. 185, Laws 1919, ratified 8 March, 1919, five days after this special Surry County act was passed, makes it clear that the thirty days advertisement was not absolutely necessary. Such restriction in the bond sale act (Laws 1917, ch. 147) is no longer mandatory.

There is no merit in the contention that the general act of 1917, ch. 147, *requires* that the bonds issued under it shall be "callable" or "optional" bonds. In subdivision *f,* of sec. 1 of that act, following the provisions for calling designated bonds before maturity, are the following words: "*Provided,* the bonds designated shall express such condition on their face." Such proviso means that only such bonds can be called as have that provision expressed on their face, and there is no requirement that it shall be so expressed on any bond. Besides, these bonds are issued under this special act for Surry County, which has no such requirement. While taxation may be levied for the payment of these and other bonds in any county under ch. 103, Laws 1917, amended by ch. 185, Laws 1919, when issued for roads and bridges, these bonds are not subject to any restrictions and provisions as to their issue and sale other than those provided in this act under which they are issued.

Affirmed.

PRODUCE TRADING COMPANY v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 1 October, 1919.)

1. **Carriers of Goods—Negligence—Connecting Lines—Initial Carriers—Evidence—Questions for Jury.**

There was evidence that an interstate carrier by water transported several carload shipments of potatoes to a point within the State, where the shipper had them assorted and then they were taken in several carload lots to a point in another State, and thence, upon telegraphed instructions, one of them was reconsigned to a still further point, the transportation by rail being over connecting carriers. On one of these shipments originating by boat, which went to a place in this State and was reshipped from there under a new bill of lading by defendant, the destination was left blank in the bill of lading issued by the carrier by water: *Held,* the steamboat company cannot be held as the initial carrier, as a matter of law, and it was properly left to the jury, under the conflicting evidence, to determine whether it or the first carrier by rail was the initial one, and therein the bills of lading were competent evidence of the intent of the contracting parties and of the true contract of shipment.

2. **Carriers of Goods—Interstate—Initial Carriers—Negligence—Damages—Federal Statutes.**

Under the Carmack amendment to the federal statute the initial carrier of interstate freight is liable to the party aggrieved or suffering loss by reason of the carrier's negligence in transporting the shipment, on whichever of the connecting carriers such loss may have occurred.

3. **Carriers of Goods—Intermediate Carrier—Negligence—Burden of Proof—Damages.**

An intermediate carrier in the line of connecting carriers of interstate freight is responsible for loss or damage arising to the shipment through its own negligence, with the burden of proof on it, when sued for damage to the goods, to show that the negligence had not occurred on its own line.

4. **Carriers of Goods—Negligence—Damages—Equitable Assignment—Party Aggrieved.**

The rule that where a shipment of goods is delivered to the carrier addressed to the consignee, the latter is the party aggrieved and the only one entitled to maintain his action against the carrier for loss or damage resulting to the shipment through the carrier's negligence, does not apply when it appears that the consignor and consignee have by their agreement or contract changed this ordinary rule, as where the consignee, with the consent of the consignor, has deducted the amount of such damage from the purchase price and the consignor had accordingly accepted the settlement, for such is, in effect, equitable assignment by the consignor of his right to recover of the carrier, and the consignor may maintain his action therefor.

5. **Carriers of Goods — Consignee — Inspection — Damages—Refusal—Consignor—Party Aggrieved.**

A consignee of goods shipped to him has a reasonable right of inspection before accepting them from the carrier, and to reject them if damaged by the carrier's negligence; and where the consignee has accepted such damaged shipment under an agreement with the consignor that such damages be deducted from the purchase price, the consignor may recover them from the carrier, as the party aggrieved.

6. **Carriers of Goods—Exchange Bills of Lading—Reconsignment—Same Shipment.**

The exercise by the consignor of his right to have a shipment of goods reconsigned *in transitu* at an intermediate point, under an exchange bill of lading, does not constitute, in law, two separate and distinct shipments.

ACTION tried before *Devin, J.*, and a jury, at February Term, 1919, of PASQUOTANK.

FIRST SHIPMENT—SECOND ISSUE.

Plaintiff sued for damages sustained in the shipment of potatoes, and he especially relied on negligence in the transportation of four lots, some of which were either injured or lost. The inquiry in regard to those damages is covered by the second, fifth, sixth and tenth issues. The first shipment of 200 barrels was to Elizabeth City, N. C., at which place, on the wharf of defendant, the potatoes were deposited by the North River Steamboat Company, it having been brought by that line from one of its landings on the river at Jarvisburg, N. C., 14 June, 1917, under a bill of lading, in which they were consigned by the plaintiff to itself—destination not mentioned but left blank. These potatoes were loaded in defendant's cars, and they were carried to Berkley, Va., and by telegraph ordered to be reconsigned there to John A. Eck, at Chicago, Ill. When they were loaded in cars at Elizabeth City, N. C., a through way-bill, or shipping instructions, reading from Jarvisburg, N. C., to Berkley, Va., was handed by the agent of the steamboat line to the agent of defendant at Elizabeth City. Ten barrels of these potatoes were lost in transit, and the market price of the others had fallen fifty cents per barrel by reason of the delay in shipment, causing the consignor to lose that much from the contract price, as the consignee exacted that much in reduction of the amount due by them.

SECOND SHIPMENT—FIFTH ISSUE.

This shipment contained 200 barrels of potatoes, consigned by plaintiff to Lally Brothers, at Chicago, Ill. Four barrels were lost in transit, and the rest were delayed in shipment and damaged by delay. The car was in bad condition, and was marked "Car in bad order, shop when empty." These potatoes were brought by the North River Line to Elizabeth City, N. C., from Morris' Wharf, N. C., a landing on the river, on 18 June, 1917. The goods moved from Elizabeth City by defendant's line and connecting carriers to Chicago, Ill. Plaintiff claims as damages $330.

THIRD SHIPMENT—SIXTH ISSUE

The bill of lading, in this case, was issued by the defendant at Pasquotank, N. C., on 19 June, 1917, in the name of the Produce Trading Company, as consignor and consignee, destination Berkley, Va., for 175 barrels of potatoes, and the bill was endorsed "S. L. & C.," meaning "shippers load and count." The car left Pasquotank on 19 June, arrived at Berkley, Va., at 4:10 p. m. the same day, and the next day, 20 June, 1917, plaintiff, by telegraph, reconsigned it at that place to Zivi & Co., Chicago, Ill., route Star Union. Plaintiff alleged damage to seven barrels of the potatoes and delay in transporting the remainder of them, whereby, as to the latter part of the shipment, plaintiff lost one dollar and 50-100 per barrel by the decline in the price. The claim is for $28 on account of the lost barrels of potatoes and $256.50 for the loss in price of the others.

FOURTH SHIPMENT—SIXTH ISSUE.

This was 207 barrels of potatoes received by defendant at Bishop's Cross and consigned to Watson & Sons, Chicago, Ill., on 17 June, 1917. When the car of potatoes arrived at its destination it was found to be short nine barrels, for which plaintiff claimed damages in the sum of $90.

Upon the verdict, the court gave judgment for the total amounts assessed by the jury under the foregoing issues, and defendant appealed.

Aydlett, Simpson & Sawyer for plaintiff.
Thompson & Wilson and W. B. Rodman for defendant.

WALKER, J., after stating the case: We have only given an outline of the several causes of action upon which the four sets of issues above set out were framed, preferring to mention the other pertinent facts in this opinion when dealing with each shipment separately.

The first set of issues related to the shipment of potatoes by the plaintiff via the North River Line to Elizabeth City, N. C., from a landing on the river. The evidence tends to show that various shipments were made to that place and there assembled for transportation, after being assorted, to distant points in other States. It did not appear clearly at the trial whether the defendant, or the North River Line, was the first carrier in the line of continuous transportation to the final destination, and the court, therefore, very properly submitted the question to the jury to say how this was. There was testimony which would authorize a decision either way, and the evidence was not conclusive of the question for either side. The proper course was therefore taken, for the decision of the question depended upon how the jury should find the facts to be. There was no destination stated in the original bill of lading, and defendant contends that the shipment was intended for Berkley, Va., from which place it was reconsigned to John A. Eck Company at Chicago, Ill. It would be impossible to hold, as a matter of law, that defendant was not the first carrier, as to do so we would have to ignore all the evidence as to the position held by the North River Line. In the first place, it was for the jury to say whether Berkley was originally intended as the destination when its designation was left blank in the bill of lading. We cannot assume in law that it was so intended to be. The jury had the right to consider the bills of lading in connection with the other relevant testimony, and they would have to do so, in order to give the true effect to the transaction. Having decided that defendant was the initial carrier, it made no difference under the Carmack amendment to the Interstate Commerce Act, as to this shipment, whether defendant was chargeable with negligence, either in respect to the loss of the potatoes or any part thereof or of the damage to them. This, we take it, is conceded by the defendant, but if not, it is correct as a principle of the law applicable to this case. But the defendant argues that the steamboat company was engaged in interstate commerce, and therefore it must have been the first carrier, and not the defendant. But the conclusion does not follow from the premise. Counsel rely on the following authorities to sustain their position: *Texas, etc., R. R. Co. v. Sabine Tram Co.,* 227 U. S., 111 (57 Law Ed., 442); *S. P. Terminal Co. v. Interstate Commerce Commission,* 219 U. S., 498 (55 L. Ed., 310); *Railroad Commission v. Washington,* 225 U. S., 101 (56 L. Ed., 1004). But the question there was not as to who was the initial carrier within the meaning of the Carmack amendment, but whether the defendant carriers were engaged in interstate commerce, and therefore subject to the rates prescribed by the Interstate Commerce Commission, and not to those of the State Railroad Commission. We will refer further to only one of those cases, which is typical of all of them, the others being practically like it In *Railroad Co. v. Sabine Tram Co., supra,* we understand the case and decision to be this: A shipment of lumber, destined by the purchaser for export, was made by the seller under a local bill of lading from an interior point in Texas to a Texas Gulf port, at which the lumber was unloaded without delay by the purchaser's order into slips or docks, in reach of ship's tackle, and was then loaded into chartered ships, by which it was carried to foreign ports—such shipment not being an isolated one, but typical of many others—constitutes foreign commerce, as the court held, and as such is governed by the tariffs on file with the Interstate Commerce Commission to the exclusion of the rates established by the State Railroad Commission, although the seller had no connection with the lumber after it reached the railway terminus, and had no concern with its destination after it came into the hands of the purchaser, and no knowledge thereof, and although the lumber had no definite foreign destination at the time of the initial shipment. But this, according to our conception, is far from holding that the first railroad which handled the lumber at Rutliff, in Texas, and destined for Sabine, was an "initial carrier." The Court held that the connecting carriers, all in Texas, from the first to the last, were subject to the federal tariffs as to switching charges, as they were engaged in interstate commerce.

The second shipment was from plaintiff, at Morris' Wharf, N. C., on the North River Line, to Lally Brothers, Chicago, Ill., and the Court held that the steamboat company was the initial carrier, and called upon the jury to inquire and find whether the defendant, who was an intermediate carrier, was actually negligent in respect to the loss of four barrels of potatoes and damage to the others, and liable therefore as a question of fact. We do not see why the case is not fully covered by *Meredith v. R. R.,* 137 N. C., 478, assuming the contract of carriage to have been that defendant, as an intermediate carrier, agreed to transport the goods over his own line and to deliver them to the next carrier on the route in the same condition that he received them. The consignor or consignee does not know the facts and it must be difficult, if not impossible, to prove them. The carriers do know them, or should know them. It is easy for any of the carriers to prove that he delivered them in good order to the next carrier, but not so for the consignor or consignee. In such a case, *Justice Connor* says, citing 3 Wood on Railroads, 1926; *Railroad Co. v. Tupelo Co.,* 67 Miss., 35; *Railroad Co. v. Emrich,* 24 Ill. App., 249, that "on proof that any carrier on the route received the goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, it being peculiarly and almost solely within its power to make such proof." He supports the proposition by many authorities, and among them 1 Elliott on Ev., 141; *U. S. v. R. R.,* 191 U. S., 84; *Brintnall v. R. R.,* 32 Vt. (op. by *Poland, J.*); *Ellis v. R. R.,* 24 N. C., 138; *Aycock v. R. R.,* 89 N. C., 321; *Lindley v. R. R.,* 88 N. C., 547; *Phillips v. R. R.,* 78 N. C., 294. In the *Meredith case, supra,* reference is made to *Mitchell v. R. R.,* 124 N. C., 236, as follows: "The principle is applied in an able and exhaustive opinion by *Mr. Justice Douglas.* It is true that he was discussing the question in respect to the burden of proof as applied to the last carrier, but we can see no reason why the same rule does not apply when the first or contracting carrier is sued. In both cases the plaintiff's cause of action is based upon the assumption of a duty and the breach thereof. The same reason which requires the last carrier to show performance of the duty applies with equal force to the first—that the sources or means of proving the exculpating facts are peculiarly within its knowledge and not otherwise open to the plaintiff. It would be a difficult if not a vain undertaking on the part of the plaintiff to locate the time and place at which his goods were injured or their delay of fourteen days occurred. Every reason which justifies the rule as to the first carrier applies with equal force to the other. It assumed the duty of safety, and within a reasonable time conveying the goods to Wilmington and delivering them to the Coast Line," that railroad company, the Coast Line, being the next carrier and also the last one in the route. *Chief Justice Smith* said, in the *Lindley case, supra:* "The obligation resting on each attaches as the goods pass into its custody, and ceases only when safely carried and delivered to its successor." The Court also says in the *Meredith case* that the license cases (*S. v. Morrison,* 14 N. C., 299; *S. v. Emery,* 98 N. C., 668; *S. v. Glenn,* 118 N. C., 1194) also support the doctrine as to the *prima facie* case and the burden resting upon the carrier of going forward with its proof of facts peculiarly within its knowledge or of taking the risk of defeat, as the *prima facie* case carries the case to the jury, the principle of all such decisions being really the same. 1 Elliott on Ev., 141, says: "The fact that the party having peculiar knowledge of the matter fails to bring it forward, may raise a presumption or justify an inference in favor of his adversary's claim, and thus shift the burden of proceeding in order to win, but the burden of establishing the issue is not shifted, nor is it ordinarily determined in the first instance by the mere fact that a negative is involved or that some fact is peculiarly within the knowledge of the adverse party." We cannot see why, under this reasonable and firmly established principle, there is not enough shown in this case to bring it within the operation of the same. There was sufficient evidence of the good condition of the potatoes when loaded on the defendant's car, and when they reached their destination the car was in a bad plight. The defendant should have offered evidence that it continued in the same condition it was when started by it on its journey until it had been delivered to the next carrier in the line of transportation, the *prima facie* case being enough to carry the case to the jury. We, therefore, hold that the charge with reference to this shipment was correct.

The third shipment, containing 175 barrels of potatoes, originated at Pasquotank or Elizabeth City, N. C., and was consigned by plaintiff to itself at Berkley, Va., and by its direction reconsigned, at that station, to Zivi & Co., Chicago, Ill. The defendant was the initial carrier and consequently was liable, under the Carmack amendment, for any loss or damage occurring during the carriage, whether caused by its negligence or not. Its remedy is one against the defaulting carrier, if it was not itself negligent. This shipment is governed by the principle already discussed.

The fourth shipment contained 207 barrels of potatoes, consigned by plaintiff at Bishop's Cross, N. C., to C. A. Watson & Sons at Chicago, Ill. This consignment is governed by the same rules heretofore discussed and applied, where defendant was the first carrier, and no further comment is necessary.

We will now consider some general questions raised by the defendant, together with the assessment of damages on each of the shipments.

It is urged that the bills of lading were open, which means that the consignor neither retained the title or any interest in the goods, and the defendant insists that, this being so, the property in the goods passed from consignor to consignee at the time of delivery to the carrier, and the plaintiff, therefore, not being injured by any loss or damage sustained, is not the proper party to sue for the same. But while that is perhaps true, nothing else appearing but the straight consignment and delivery to the carrier, there may be such an arrangement between the two parties, consignor and consignee, as to change the ordinary rule arising out of that simple relation and to entitle the consignor to sue for the loss or damage. Has such a change been wrought in this case? We are of the opinion that there has been. If the goods were either lost or damaged by the wrong or negligence of the carrier, and on demand of the consignee, and afterwards by mutual consent of the parties, the price of the goods was docked by as much as the loss or damage, and the settlement made on that basis, we cannot see why this does not amount to an equitable assignment to the consignor of the consignee's right to recover of the carrier, and to the extent that the consignor has been required to reduce the price he has suffered a loss by the negligence of the carrier. Whether you consider it as an assignment to the consignor of the consignee's right to so much against the carrier, or as a loss of so much indirectly to the consignor by the negligence, or as ultimately a sale on the account of the consignor, it seems to us that the latter should have the right to sue. We have said that, by the consignment under such a bill of lading the title *prima facie* passes to the consignee, which does not, however, exclude the idea that the consignor has not lost all and every right in the shipment. The consignee gets the title, so that he may sue for the specific recovery of the goods, and damages for any loss or injury to them by the carrier, if he elects so to do, but he may settle with the consignor, or so agree with him, that the latter may acquire the right to recover for any loss or damage he may have suffered. The case falls within the principle of *Aydlett v. R. R.*, 172 N. C., 47; *Buggy Co. v. R. R.*, 152 N. C., 122; *Summers v. R. R.*, 138 N. C., 295; *R. R. v. Guano Co.*, 103 Ga., 590; *Cardwell v. R. R.*, 146 N. C., 218. But if this is not so, the consignee would not have received the goods but for this arrangement, and he had the right of reasonable inspection for the purpose of ascertaining their condition and rejecting them if damaged. 6 Cyc., 465. If the consignee could refuse to receive the goods, on account of injury to them caused by the negligence of the carrier, a reduction in price allowed to induce a receipt of them would be the loss of the consignor for which he should recover of the carrier, as he is the party aggrieved, and to the extent of this loss has an interest in the shipment. The court charged that the loss must have been charged back to the consignor. We can see, in the record, testimony sufficient to show that there was damage or loss in respect to each shipment.

We have assumed as correct, in our discussion of the case, the position of defendant, that the reconsignment at Berkley or elsewhere would not make a new shipment or change the initial point in the line of transportation, and thus break its continuity, so as to bring the defendant's liability within the operation of the Carmack amendment as to the first carrier. *Atchison, T. & S. R. R. v. Harold*, 241 U. S., 371 (60 Law Ed., 1050); *Missouri, etc., R. R. v. Wall*, 24 U. S., 383-388; *Myers v. R. R.*, 171 N. C., 194. When the consignor controls the bill of lading or has the right to change the destination or divert the goods to a new one, this does not break the connection, but the new destination is regarded as if it were the original one. *Myers v. R. R.*, 171 N. C., 190.

The letters on the bills, S. L. & C., meaning shippers load and count, merely changed the burden of proof. If they had not been there, and the carrier had loaded and counted the goods, the burden would have been upon it, if there had been any loss or damage, but where the shipper undertakes to load and count the goods, this burden is shifted and the latter must affirmatively show his damage. This burden was properly placed on him by the judge, and there being some evidence of the loss and damage, there was no error on this score.

The judge could not have nonsuited the case upon the ground that there was no evidence. In the case of S. L. & C. shipments, these letters required explanation, and, besides, there was some evidence upon all phases of the case, so far as defendant's negligence is concerned, when we consider and apply the rule stated in *Meredith v. R. R., supra,* and the other authorities cited in connection therewith. There was also evidence as to the damages and plaintiff's right to recover them, and in respect to those instances where the defendant company has been acquitted of negligence, it is liable, whether or no the loss or damage occurred on its line, under the Carmack amendment.

The jury found that, while the defendant was not the initial carrier, it was guilty of individual negligence, or that the loss or damage by negligence took place on its line, and that in the other instances it was liable under the Carmack amendment, and assessed the damage, for which the judgment was entered. There was no error in the rulings which vitiated the verdict.

Before closing we will say, in answer to the position taken by defendant in its supplemental brief, that the cases of *Ch. & W. C. R. R. v. Varnville F. Co.*, 237 U. S., 567 (59 L. Ed., 1137), and *Atchison, etc., R. R. v. Harold*, 241 U. S., 371 (60 L. Ed., 1050), have not been overlooked. We have not held, in this case, that an intermediate or delivering carrier is liable for a loss or damage not shown to have happened while the goods were in its possession. We have, on the other hand, held defendant liable as the initial carrier, or when it was not such but an intermediate one, we have so held it liable, because there was some evidence, under the principle of Meredith's case, that the loss did actually occur on its line. Nor have we failed to give the defendant the benefit of the position that a reconsignment, at an intermediate point, under an exchange bill of lading, did not constitute two separate and distinct shipments. *Atchison, etc., R. R. v. Harold, supra.* Nor do we think that this case, owing to its peculiar facts, falls within the principle of *Galveston, etc., R. R. v. Wallace*, 223 U. S., 481 (56 L. Ed., 516). There is testimony here which, in at least one view of it, tends to show that the North River Line took no part in a continuous shipment from Jarvisburg to the final destination in the West, but merely delivered the potatoes at Elizabeth City, where all the lots of potatoes were assembled, and there weighed and reassorted, and then started on their interstate journey to Chicago, Ill., or elsewhere in some other State. The bill of lading was not, in this case, of such a decisive character as to preclude inquiry as to whether it was really that of defendant as the initial carrier, and the matter was properly left to the jury.

We have not found it necessary to consider the case of *Paper Box Co. v. R. R.*, 177 N. C., 351, but have decided the case on other grounds.

The question as to the number of the cars was one of identity, and was for the jury to decide upon the evidence.

We have endeavored to review all of defendant's material points, and after doing so no error is found.

No error.

J. S. WOODWARD v. THE SAVINGS AND TRUST COMPANY.

(Filed 1 October, 1919.)

1. **Banks and Banking — Depositors—Signatures—Forgeries—Presumptions —Credits—Fraud—Checks—Payment.**

   A drawee bank is presumed to know the genuineness of the signatures of its depositors, and when it accepts a forged check from another of its depositors and places it to his credit, it is considered as a payment of the check which, without anything further appearing, cannot be withdrawn; but where such other depositor is aware of the fact of forgery, endorses the check, and it is accordingly credited to him without knowledge of such facts on the part of the bank, the bank may return the check to such depositor and rightfully charge his account therewith, without reference to any fraudulent intent on his part.

2. **Banks and Banking—Negotiable Instruments—Holders—Due Course—Indorsers—Guarantees—Statutes.**

   The liabilities of an endorser of a negotiable instrument are, under the law, only in favor of a holder in due course, and do not attach when the payer of a check endorses it to the drawee bank, which simply pays out of the drawer's funds in its hands.

APPEAL by plaintiff from *Devin, J.*, at May Term, 1919, of BEAUFORT.

This is an action to recover damages against the defendant bank for charging back against the account of the plaintiff a check of $380.

The jury returned the following verdict:

1. Did the defendant represent to the plaintiff that the check for $380, signed in the name of Winnie E. Jackson, was good and would be paid? Answer: "No."

2. Was the plaintiff induced by said representation to sell and deliver the car to Simon Jackson? Answer: "No."

3. Did the defendant accept the check for $380 and credit plaintiff's account therewith? Answer: "Yes."

4. Was the name of Winnie E. Jackson signed to said check without the authority, knowledge or consent of said Winnie E. Jackson? Answer: "Yes."

5. What damage, if any, is plaintiff entitled to recover therefor? Answer: "None."

The verdict, considered in connection with the evidence and the charge, discloses the following facts: In January, 1919, the plaintiff was engaged in the business of selling automobiles in Washington under the name of the Overland Washington Company. On the morning of 24 January, one Simon Jackson went to the place of business of the plaintiff about 8 o'clock in the morning and entered into a contract for the purchase of a Ford car from one Hollowell, agent of the plaintiff, by the terms of which Jackson was to pay $20 in cash, give a paper for $100 with solvent endorsers, a check for $280, and a note for $25 secured by mortgage on the automobile. Simon Jackson had no account with the defendant bank but he gave a check for the $280, signing the name of his mother, Winnie Jackson, as drawer, who did have an account in the bank. Hollowell took the check to the defendant bank and asked if the check of Winnie Jackson for $280 was good, which was answered in the affirmative, Winnie Jackson having at that time $340 to her credit in the bank. Hollowell returned to the place of business of the plaintiff when the plaintiff was present, and it was then found that Simon Jackson could not secure the papers for $100 properly endorsed, and the check for $280 was then torn up, and he gave to the plaintiff as payee another check upon the defendant bank for $380, signing the name of Winnie Jackson as drawer in the presence of the plaintiff, who took this check to the bank, endorsed it, passed it across the counter, and was given credit for the same on his account as a depositor. Later in the day the defendant bank charged back the check to the account of the plaintiff, finding that Winnie Jackson did not have $380 to her credit and that she had not authorized Simon Jackson to sign her name to the check, which the jury finds to be a fact.

The automobile was delivered to Simon Jackson on Friday and was used by him, and being injured, was returned to the plaintiff on Saturday for repairs.

The plaintiff then, claiming the right to hold the automobile under his mortgage to secure the $25, after advertisement, sold it and had it bought in for himself.

The plaintiff now has the automobile, $20 in cash paid by Simon Jackson, and his note for $25.

The plaintiff moved for judgment on the third issue, which was refused, and he excepted.

Judgment was rendered for the defendant, and the plaintiff appealed.

E. A. Daniel, Jr., attorney for plaintiff.
Stewart & Bryan and Ward & Grimes attorneys for defendant.

ALLEN, J. The weight of authority is in favor of the proposition for which the plaintiff contends, that a bank, the drawee of a check, accepting it unconditionally and passing it to the credit of the depositor, in the absence of special custom known to the depositor, cannot charge it back against the account of the depositor on the ground that it is an overdraft.

The Court says in *Bank v. Burkhart,* 100 U. S., 689: "In Morse's well-considered work on Banking, p. 321, it is said: 'But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.'

"We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason. The authority referred to sustains the text.

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject or to receive it, upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. This case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned. It was well said by an eminent Chief Justice: 'If there has ever been a doubt on this point there should be none hereafter.' *Oddie v. The National City Bank of New York*, 45 N. Y., 735.

"When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though when the payment was made the officers labored under the mistake that there were funds sufficient. In such a case the bank could have received the check conditionally, and have come under obligations to account to the holder for it only in the event that on an examination of the accounts of the drawer it was found he had funds to meet it, or in the event that he provided funds for its payment. Or it could have asked for time to examine the accounts, that it might determine whether it would accept and pay or dishonor the check. It would have been within the option of the holder to have accepted or rejected either of these propositions. But when the holder presented the check with his pass book, that the check might be entered as a deposit to his credit, it was a request for the payment of the check; and there can be no distinction between a request for payment in money and a request for payment by a transfer to the credit of the holder." 3 R. C. L., 526.

To the same effect see 7 C. J., 681; *Levy v. Bank,* 4 Dall., 142; *Bank v. Barnes,* 44 A. R., 142; *Bank v. Gregg,* 32 A. R., 173; *Wasson v. Lamb,* 16 A. S. R., 345.

And the authorities also sustain the position that the same rule applies when the check is a forgery.

"A bank is bound to know the signatures of its customers; and if it pays a forged check it must be considered as making the payment out of its own funds, and cannot ordinarily charge the amount so paid to the account of the depositor whose name was forged." 7 C. J., 683.

"In pursuance of the rule that a bank as between itself and the *bona fide* holder of a check is bound to know the signature of its depositors, and cannot recover from such a holder money paid to him upon the subsequent discovery that the drawer's name was forged, if a depositor presents a check, which he holds in good faith, drawn on the bank by another depositor, and the check is credited to him in his account and charged to the drawer, this is in effect a payment of the check, and the bank cannot strike off the credit." 3 R. C. L., 527.

This principle was first declared by *Lord Mansfield* in 1762 in *Price v. Neal,* 3 Burrows, 1355, and has been adopted in *U. S. v. Bank,* 10 Wheat., 333; *Neal v. Coburn,* 92 Me., 145; *Bank v. Bank,* 107 Iowa, 337; *Bank v. Bank,* 90 Ky., 15; *Bank v. Bank,* 30 Md., 21; *Bernheimer v. Marshal,* 2 Minn., 82; *Bank v. Bank,* 46 N. Y., 77; *Bank v. Bank,* 60 Minn., 198; *Bank v. Bank,* 10 Vt., 145; *Yarborough v. Trust Co.,* 142 N. C., 381, and indeed in all the States except Pennsylvania, where it has been changed by statute. *Bank v. Bank,* 66 Pa. St., 438.

These principles rest upon the presumption that the drawer knows the signature of its customer, and upon the necessity of fixing some time when there shall be no further inquiry by the one upon whom it is drawn into the integrity of commercial paper with which so much of the business of the world is done today, but the courts recognize that they are establishing a rule at variance with the principle that money paid under a mistake of fact may be recovered, and the one depositing the check, if both the payee and endorser of the check, is held to knowledge of all other facts except the signature of the drawer, and he can take no benefit from the transaction if he actively participated in the forgery, although without fraudulent intent.

This is true because the payee in the check is necessarily brought in close touch with the drawer, and has every opportunity to inquire into the regularity and genuineness of the paper.

"It would be an exceedingly harsh rule to permit one who negotiates with the forger, and obtains his check payable to the use of the party advancing the money, who then endorses it to a bank, to hold on to the money when the payee has himself contracted with the forger, and given credit to the paper by his endorsement that led the bank to believe the paper was genuine." *Bank v. Bank,* 90 Ky., 10.

"The drawee bank is held to a knowledge of the signature of the drawer, but the payee-endorser is held to a knowledge of all other facts.

"The discounting bank and the drawee bank in such a case have the right to rely upon the endorsement of the payee, and as to him, are not required to exercise any diligence to discover the fact that the check had been raised. These facts are conclusively presumed to be within the knowledge of the payee. Under such circumstances the money paid can be recovered back in *assumpsit,* unless possibly, from some subsequent arrangement or cause, the right is lost. Certainly, the fact that the payee, who received the money as payee and ostensible owner, has disposed of it according to his own will, cannot in any way affect this right. The authorities cited by appellee to the proposition, that if a bank pays a forged check to holder without fault, who in ignorance of the fraud pays value for it, the money cannot be recovered back, are not applicable to the case at bar. Bradley was the payee, and by his endorsement obtained the money. He parted with nothing to get possession of the check. Its genuineness is conclusive as to him, and as endorser he guaranteed it to be genuine for the amount expressed in the check. *Carpenter v. Nat. Bank,* 123 Mass., 66; *Nat. Park Bank v. Seaboard Bank,* 114 New York, 28; 11 Amer. St. Rep., 612; *White v. Bank,* 64 New York, 316 *Susquehanna Bank v. Loomis,* 85 New York, 207." *Bank v. Bradley,* 103 Alabama, at p. 119.

"In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by endorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signature of its own customers, and therefore is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud or the mistake of fact under which the payment has been made. . . . To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken. *Ellis v. Ohio Ins. and*

Trust Co., 4 Ohio St., 628; *Rouvant v. San Antonio Nat. Bank*, 63 Texas, 610; *First Nat. Bank of Quincy v. Ricker*, 71 Ill., 439." *Bank v. Bank,* 151 Mass., 280.

In this case the plaintiff was present and saw Simon Jackson sign the name of Winnie Jackson to the check, and he made no inquiry except of Simon of his authority to do so. He carried the check to the bank during business hours, and according to the evidence of the defendant, which the jury has accepted, endorsed it and had it passed to his credit without giving any information to the bank of the circumstances attending the drawing of the check.

The plaintiff offered evidence to the contrary, but his theory of the case has been repudiated.

Under these conditions the plaintiff cannot be permitted to recover.

We have made no reference to the liability of an endorser under the Negotiable Instrument Law because his guaranties under that law are only in favor of a holder in due course, and the drawee bank does not occupy that position. *Bank v. Bank,* 115 Tenn., 17.

It pays nothing and simply honors an order on funds in its hands.

It also appears, and the jury has so found, that the plaintiff has suffered no damage, and that if he recovered $380 of the defendant it would be a recovery for which he has paid nothing.

He sold a Ford car to Simon Jackson on Friday for $425 of which $20 was paid in cash and the balance by the check of Winnie Jackson on the defendant for $380 and the note of Simon Jackson for $25 secured by mortgage on the car.

Simon Jackson kept the car one day and returned it to the plaintiff for repairs, there being evidence that the car was damaged, but the extent not shown.

The plaintiff then advertised the car for sale under the chattel mortgage of Simon Jackson, and at the sale had it bought for himself, and he now has the car and $20 to indemnify him for the repairs, the amount of which he did not state, and the use of the car one day.

No error.

B. J. McFARLAND v. MRS. FLORA HARRINGTON.

(Filed 1 October, 1919.)

1. Trusts—Parol Trusts—Statute of Frauds—Equity.

The plaintiff and his two brothers were owners of an undivided half-interest, as tenants in common, of lands descended to them as heirs at law of their deceased father, the defendant and her two sisters owning the other one-half interest as his heirs. The plaintiff and his two brothers mortgaged their one-half interest for the support of their sisters, the mortgage was foreclosed and the purchaser commenced proceedings for partition. There was evidence tending to show that during the pendency of the proceedings for partition it was agreed by parol between the purchaser and the parties to the present action that the plaintiff should acquire the half-interest that he and his two brothers had mortgaged upon his paying to the purchaser the principal and interest, etc., of the purchase price, the title should be made to the defendant to be held by her in trust for the plaintiff, and that this was accordingly done: *Held*, the transaction did not fall within the intent and meaning of the Statute of Frauds, and the defendant, having acquired the title by reason of her promise, was required in equity to perform it; and that the jury having, under proper instructions, found the facts to be according to the evidence, the parol trust in plaintiff's favor was a valid and enforceable one.

2. **Attorney and Client—Express Authority—Principal and Agent—Evidence—Burden of Proof.**

Where there is evidence tending to show that the attorneys of the parties to a suit to engraft a parol trust on the title to lands had direct or specific authority to act therein for their clients, distinct from any implied by the relationship of client and attorney, an instruction to the jury that the burden of proof was upon the plaintiff was a proper one.

3. **Trusts—Parol Trusts—Burden of Proof.**

The burden is on the plaintiff, in an action to engraft a parol trust upon the legal title to lands, to establish his contention by clear, strong and convincing proof.

Action tried before *Connor, J.,* and a jury, at May Term, 1919, of Lee.

Some time before the institution of this action the plaintiff, two brothers and three sisters, one of them the defendant, were tenants in common of a tract of land which they inherited from their father, and the plaintiff, with the three sisters and their mother, were living on the land, he being a young man at the time.

The plaintiff and his two brothers made a mortgage on their interest in the land to secure food and clothing for the defendant and other sisters, leaving the interest of the sisters unencumbered. The mother joined to bar dower, and has been dead for many years.

The plaintiff was unable to redeem his interest, and the one-half undivided interest (that of the three brothers) was sold under the mortgage and was acquired by J. A. McIver, through a third person who bought at the sale. The original interest of the defendant and her sisters is not in the controversy. Subsequently McIver brought a partition proceeding in the Superior Court of Lee County against the three sisters, including this defendant. The defendants in that proceeding denied the title of the petitioner, and the cotenancy, raising an issue of fact, and the cause was transferred to the civil issue docket for trial, where it remained for several years without any action being taken in it.

In 1918 the defendant, Mrs. Harrington, employed an attorney to bring the case to a hearing, so that she could get her interest, one-sixth, out of it, stating that they had been defending the proceeding so that her brother, Jones McFarland (this plaintiff), could recover something; that she was still willing to do all she could for him. Later, the attorney and the plaintiff were brought together through Mrs. Harrington. and represented them both. He immediately sought to have this plaintiff made a party to the partition proceeding, but the petitioner resisting this, he failed. He then interviewed J. A. McIver, the petitioner, in the interest of McFarland, to secure a compromise, and McIver told him whatever his attorney did in the matter would be satisfactory. The attorney also testified that Mr. McIver told him he only wanted to come out without loss—get his money and interest back, and his attorney's fees, but wanted the original mortgagors, or such of them as desired, to get whatever advantage there was in it; that he searched for the mortgagors, found that the widow and one of the brothers were dead, and the other brother, Malcolm (who had not remained on the farm with the mother and sisters), wanted "Jones," the plaintiff, "to have it."

The cause came on for trial, and plaintiff's attorney unsuccessfully renewed his motion to have B. J. McFarland made a party. The jury returned a verdict for the petitioner for his one-half interest in the land, it being agreed, however, that B. J. McFarland was to have McIver's interest upon payment of the stipulated amount.

It was agreed between the attorneys of McIver and plaintiff (neither of counsel in this case), representing their clients, that upon payment into court within a given time of this amount McFarland should have title to the property, and that a judgment should be drawn securing this result; but McFarland was not a party, and it was therefore agreed that if Mrs. Harrington would consent to take title in her name, she being a party and sister of McFarland, the judgment should be so drawn and she would reconvey to McFarland, this plaintiff. A draft of the judgment was made and shown to the defendant and explained to her, and she agreed, as plaintiff's attorney testified, to take and hold the title for this plaintiff and reconvey to him. The judgment was then signed, and the attorney delivered to her a copy.

The defendant denied, in her testimony, that she made any agreement about it, but admitted that she saw the judgment after it was signed, and testified that she knew nothing about the transaction before. Both plaintiff and defendant deposited the money with the clerk, where the deed was deposited by McIver, in accordance with the terms of the judgment. The defendant got the deed, refused to convey to the plaintiff, and the plaintiff sued.

The following issue was submitted to the jury: "Did the defendant, Mrs. Flora Harrington, agree to take the title to the land described in the pleadings for the benefit of the plaintiff, B. J. McFarland, and to reconvey the same to him?" It was answered: "Yes."

Judgment for the plaintiff upon the verdict, and defendant appealed.

Seawell & Milliken for plaintiff.
Williams & Williams for defendant.

Walker, J., after stating the facts as above: The only question of importance in this case is whether the defendant, Mrs. Harrington, at the time the judgment was drawn, and before or at the time the legal title passed to her, promised and agreed that she would accept the title upon the trust to hold it for her brother (as to the half interest in the land) until he could pay the stipulated amount of money to fully reimburse Mr. McIver, and then convey the half interest to the plaintiff. There was evidence to support the plaintiff's allegation of a trust, such as is above set forth, and it was fairly and correctly submitted to the jury. If such an agreement was made and she obtained the deed thereby, it created an enforceable trust in favor of the plaintiff. *Avery v. Stewart,* 136 N. C., 426. She would not have acquired the legal title except for the confidence reposed in her by the other parties that she would perform her part of the agreement, and the law declares it inequitable that she should be permitted longer to hold it in violation of her promise. She will not be allowed to keep the title and repudiate the promise. *Sykes v. Boone,* 132 N. C., 199; *Jones v. Jones,* 164 N. C., 320; *Allen v. Gooding,* 173 N. C., 93. In the last cited case the Chief Justice thus states the law, quoting from the authorities mentioned: "Where one party has by his promise to buy, hold, or dispose of real property for the benefit of another induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced. Bispham's Eq., sec. 218. When a party acquires property by conveyance or devise secured to himself under assurance that he will transfer the property to or hold and appropriate it for the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself," citing *Glass v. Hulbert,* 102 Mass., 39. This doctrine has been frequently affirmed by this Court before and since *Avery v. Stewart, supra,* was decided. Recent cases are *Rush v. McPherson,* 176 N. C., 562, citing *Cohn v. Chapman,* 62 N. C., 92; *Boone v. Lee,* 175 N. C., 383, at p. 386, where it was said: "In one aspect of our case this is a parol express trust, not enforcible under the statute of frauds, but as it is a solemn declaration of one party that if the legal estate is conveyed to him he will hold it in trust for another, it would be fraudulent and unconscionable for him to acquire the legal title by this engagement to hold it for another and not comply with his promise, and therefore equity will enforce the trust, as the statute of frauds does not apply to such cases on account of the fraud and the trust created thereby," citing *Sykes v. Boone, supra; Avery v. Stewart, supra.*

There was not only evidence to establish this trust, but Mr. McIver afterwards expressly ratified what was done by his attorney, and was perfectly willing that the plaintiff should have the full benefit of the transaction. The evidence shows that he did not intend that the defendant should have the half of the land he had acquired through the purchaser at the sale, but that it should go either to all of the former owners of the half in controversy, or to any one of them who desired it. That was the view he took of it, but the material question is what the defendant agreed to do, and the jury, upon full evidence, have so found against her as to fasten a trust on the title she holds for the benefit of the plaintiff. This seems to us very plain from the record as we have construed it. There was no variance between the allegation and the proof. The complaint alleged a parol trust by agreement with Mrs. Harrington, in behalf of the plaintiff, as to the half of the land, and there is proof to show it. Mr. McIver wanted his money—the whole of it, and was willing that the plaintiff, as one of the original owners and mortgagors, should have the land. He left the matter entirely to his attorney, who made such an agreement, through the plaintiff's attorney, with Mrs. Harrington, and it appears that Mr. McIver afterwards expressed his satisfaction with what had been done by the attorneys. The plaintiff's attorney stated to this defendant that he could get Mr. McIver's half interest for his client, the plaintiff, who was defendant's brother, and it had been suggested to him that he see her and ascertain if this was agreeable to her. She replied: "That is all right; anything on earth that is reasonable, let my brother get his interest in it," and after telling her that she would have to make a transfer or deed to him she said, "I will fix that at any time." She denied that she had assented to any such arrangement or that she had promised to convey the McIver one-half to her brother, but the jury have settled the facts, so it has been found that there was an agreement of all the parties to the settlement of the matter.

Some objection has been urged to the authority of the attorneys, but there is ample evidence of it, and that they kept within the limit of it.

This authority was an express one, and not to be implied merely from the fact of the attorneyship, as in the cases cited to us.

The remaining exceptions relate to prayers for instructions tendered by the defendant as to the authority of the attorneys, the burden of proof, and the quantum thereof. We have disposed of the question as to the attorneys' authority, and the judge charged fully and correctly as to the burden of proof, placing it squarely upon the plaintiff, and also as to the quantum of the evidence required to be adduced by him, when he told the jury that it must be clear, strong and convincing. The charge was singularly clear and comprehensive, and was exceedingly fair to the defendant.

We have searched the record diligently, and no error is to be found therein.

No error.

L. J. UPTON & CO. v. S. W. FEREBEE AND ANTHONY AVERY.

(Filed 1 October, 1919.)

1. **Appeal and Error—Courts—Verdict Set Aside.**

   Where a trial has proceeded upon the question of estoppel which has not been pleaded, as required, and the trial judge has set the verdict aside as a matter of law, without assigning his reason but with permission to the party to plead the estoppel, his action will be construed, on appeal, as based upon his own error, and his setting aside the verdict will not be held as erroneous.

2. **Estoppel—Landlord and Tenant—Tenants' Contracts—Landlord's Lien—Instructions.**

   Where the landlord signs a contract for his tenant who cannot write, at his request, with a third person, under which the parties to the contract agree that the tenant should grow a crop upon the landlord's land for a division thereof, and the conduct of the landlord in signing the agreement for his tenant is sought to estop him from claiming a part of the crops under his statutory lien, and the evidence is conflicting as to whether the landlord read the lien, an instruction by the court should be explicit upon the question of the landlord's knowledge of the contents of the written contract and as to whether he intended to release the rents, and an instruction assuming these to be facts as a matter of law is reversible error.

The elements constituting estoppel discussed by ALLEN, J.

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1919, of PAMLICO.

This is an action to recover fourteen barrels of Irish potatoes which the defendant Ferebee took possession of. On 13 November, 1916, L. J. Upton & Co. entered into a contract with one Anthony Avery, a tenant of Ferebee, which contract was signed for Anthony Avery, who could not write, by S. W. Ferebee, who was his landlord. Under this contract the plaintiff and the defendant agreed to plant and grow on equal shares during the spring and summer season of 1917 a crop of Irish Cobbler potatoes. Upton furnished the seed potatoes, fourteen bags, furnished the fertilizer, on the basis of 2½ bags to each bag of seed potatoes, and the defendant Anthony Avery was to cultivate and harvest said crop. One-half of the crop was to be the property of Upton and the other one-half the defendant's. And under the seventh paragraph of the contract Upton & Co. agreed to purchase the one-half of the crop, the property of the defendant, at the price of $2.50 per barrel delivered on cars at Stonewall. It is admitted that all of the potatoes raised by Avery were grown from the seed potatoes furnished by Upton, that all the barrels were furnished by Upton, and all the fertilizer used to grow the potatoes was furnished by Upton.

The defendant Ferebee, after the potatoes were harvested and delivered to Upton at the railroad station, took fourteen barrels of the same, claiming them to be due him for rent.

The defendant set up his title as landlord in his answer, and there was no plea of an estoppel by the plaintiff.

His Honor charged the jury in part as follows:

"Now, I charge you, gentlemen, that if the evidence satisfies you by its greater weight that Ferebee knew that it was the intention of Upton to take and Avery to give a paper disposing of the whole of the potato crop to be grown on Ferebee's lands by Avery, and aided in the execution of the paper with this knowledge, and permitted Upton to furnish seed potatoes, fertilizer, and barrels under the terms of said paper to Avery, then Ferebee would be estopped to claim any of the potatoes, and you should answer the first issue 'Yes.'"

The jury returned the following verdict:

1. Are the plaintiffs owners of the property described in the complaint? Answer: "Yes."

2. What was the value of the potatoes at the time of the seizure? Answer: "$9 per barrel."

His Honor then set aside the verdict as matter of law and allowed the plaintiff to amend by pleading an estoppel, and the plaintiff excepted and appealed.

Moore & Dunn attorneys for plaintiffs.
D. L. Ward and Z. V. Rawls attorneys for defendant.

ALLEN, J. The judge presiding at the trial set aside the verdict as matter of law, without assigning any reason, and his ruling may be sustained upon the ground that the case was submitted to the jury upon the question of estoppel when no such issue was raised by the pleadings. "An estoppel which 'shutteth a man's mouth to speak the truth' should be pleaded with certainty and particularity. 8 Enc. Pl. & Pr., 11. The court should be able to see from the pleadings what facts are relied upon to work the estoppel" (*Porter v. Armstrong,* 134 N. C., 455), and this case does not come within the exceptions to the rule, holding that it is not necessary to plead an estoppel when it is apparent on the face of the record or when the pleadings are general as in ejectment or trespass and the party has had no opportunity to enter the plea (*Wilkins v. Suttle,* 114 N. C., 556; *Weeks v. McPhail,* 129 N. C., 73), because in his answer the defendant alleges the tenancy and his claim as landlord, thus affording the opportunity to meet these allegations by pleading the facts relied on to create the estoppel.

This seems to have been the opinion of his Honor as he made the order a part of his judgment that the plaintiff be "allowed to amend his complaint as he may be advised, setting up an estoppel against the defendant Ferebee."

We are also of opinion the charge was not sufficiently specific and that it omitted an important and material element of an estoppel *in pais* or by conduct.

In view of the conflict in the evidence as to the circumstances attending the execution of the contract between the plaintiff and the defendant Avery, the plaintiff offering evidence that Ferebee read the contract and the defendant denying this, there ought to have been some explanation of what was meant by aiding in the execution of the paper and of the difference in legal effect between signing the name of Avery because he could not write and doing so after reading.

There is, however, a more serious objection to the charge in that it collects the evidentiary facts relied on by the plaintiff, and instructs the jury, if found to exist, they constitute an estoppel, leaving out of consideration that the conduct of the defendant must be the equivalent to a representation that he would make no claim as landlord, and was so understood by the plaintiff, and relying thereon the plaintiff entered into the contract, and furnished fertilizer, etc.

In other words, the agent of the plaintiff who negotiated the contract and the defendant both testifying that nothing was said about rents or of the rights of the landlord, it was for the jury to say whether the conduct of the defendant amounted to a representation, which was relied on by the plaintiff, while his Honor decided these questions as matter of law.

Mr. Pomeroy, in Equity Jurisprudence, V. 2, sec. 805 (2d Ed.), states the following as the requisites of an estoppel *in pais* or equitable estoppel: "1. There must be conduct—acts, language, or silence—

amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, *and at the time when it was acted upon by him.* 4. The conduct must be done with the intention, or at least with the *expectation,* that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply *impossible* to ascribe any *intention* or even *expectation* to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. 5. The conduct must be relied upon by the other party, and thus relying, he must be held to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse."

The same principles are declared in *Lumber Co. v. Price,* 144 N. C., 57, and *Hardware Co. v. Lewis,* 173 N. C., 295, and in *Boddie v. Bond,* 154 N. C., 365, where the Court says: "In order to constitute an equitable estoppel there must exist a false representation or concealment of material fact, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge or, having the means of knowledge of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice. 16 Cyc., 722; Eaton's Equity, p. 169. It is a species of fraud which forms the basis of the doctrine, and to prevent its consummation is its object."

In this case there was no concealment of any fact as the agent of the plaintiff knew he was contracting with a tenant and that Ferebee was the landlord, and if it was the intention to release rents and was so understood, it is strange that Ferebee was not asked to make himself a party to the contract.

There is no error in setting aside the verdict.

No error.

R. H. LEE v. L. J. UPTON & CO.

(Filed 1 October, 1919.)

Contracts — Breach—Admissions—Damages—Evidence—Allegations—Contemplated Damages—Pleadings.

The plaintiff and defendant contracted, among other things, that the plaintiff should raise Irish potatoes upon his own land and furnish them at a certain price to the defendant, in barrels the latter should supply by a specified time, and demanded damages for the defendant's failure to so furnish them. Without specific allegation the plaintiff attempted to show that he was also damaged in not having sufficient time, owing to defendant's breach of contract, to plant and mature for that season a crop of sweet potatoes on the same land. Upon plaintiff's admission to the effect that the defendant's failure to sooner deliver the barrels at an earlier date did not cause him damages, that he had sufficient barrels on hand, etc.: *Held*, no actual damages are recoverable; and as to the failure to raise the sweet potato crop, such damages were not alleged or shown to have been within the reasonable contemplation of the parties, and the evidence as to them was properly excluded.

APPEAL by plaintiff from *Daniels, J.*, at April Term, 1919, of PAMLICO.

This is an action for the recovery of two thousand dollars for breach of contract.

The contract, which was entered into by the plaintiff and defendant and offered in evidence, provides that the defendant was to furnish fertilizer and one hundred bags of Irish Cobbler seed potatoes at a price to be paid by plaintiff to defendant. The defendant was also to furnish and deliver to plaintiff f. o. b. Oriental, N. C., one-half of the empty barrels and covers necessary for harvesting said crop of potatoes, the defendant was also to furnish to plaintiff all the empty barrels and covers necessary for harvesting all of his half of said potatoes. The plaintiff was to furnish the land, properly prepare same for crop of early potatoes, plant, cultivate and harvest said potatoes under the supervision, direction and control of defendant, and to deliver same f. o. b. care of the railroad station at Oriental where they were to be divided equally by the plaintiff and defendant.

The plaintiff was to sell to the defendant his half of his said crop of potatoes for two dollars and fifty cents per barrel.

The seventh paragraph of the contract is as follows:

"7. The said second party hereby agrees to sell to the said first party, and the said first party hereby agrees to purchase from the said second party, all of the said second party's one-half part, or share, of all strictly number one potatoes and all strictly number two potatoes, which shall be grown from the said crop of Irish potatoes, at the price of

$2.50 per barrel for number ones and $2.50 per barrel for number twos, put up in new standard barrels, filled full and well rounded, and properly graded, and delivered to the said first party or its agent, free, on board cars, at Oriental railroad station, in such quantities, from day to day, or from time to time, between 1 June and 5 June, 1917, as the said first party or its agent may direct. From the purchase price of said second party's one-half share of said potatoes so delivered to the first party the first party shall deduct whatever amount the second party may owe it, and shall pay the balance, if any, to the said second party promptly after deliveries."

In the complaint the plaintiff alleges a breach of contract in that the defendant did not furnish him barrels in time for him to deliver the Irish potatoes between 1 June and 5 June, and upon the trial he offered evidence that he intended planting sweet potatoes where he had the Irish potatoes and that by reason of the delay his sweet potato crop was later and damaged.

This evidence was excluded, and the plaintiff excepted. At the conclusion of the evidence his Honor held that the plaintiff was not entitled to recover damages for breach of contract, and upon payment into court of the amount due the plaintiff for his part of the potatoes according to the contract entered judgment of nonsuit.

Z. V. Rawls and D. L. Ward attorneys for plaintiff.
Moore & Dunn attorneys for defendant.

ALLEN, J. Conceding that the contract required the defendant to furnish barrels so the plaintiff could deliver the potatoes between the first and the fifth of June, the evidence of the plaintiff shows that the failure to do so was not the cause of the delay, and that the defendant was not damaged because he did not get the barrels in time.

The plaintiff testified in his own behalf: "I sent word to the defendant that my potatoes were ready for digging and I wanted to start on 5 June. I sent this message on 4 June."

He also admitted that he had over 700 empty barrels at his house on 5 June, and his brother, M. D. Lee, who was a witness for the plaintiff, testified that he got for the plaintiff from the defendant 500 barrels in one load and 250 barrels in another before 4 June.

If, therefore, the plaintiff was not ready to dig his potatoes until 5 June, and he then had 750 barrels, it is difficult to see upon what theory he can hope to recover damages for failure to furnish barrels to enable him to make delivery between the first and fifth of June. The evidence shows also that the plaintiff did not begin digging until 11 June, and that he completed the delivery of his crop of 1,502 barrels by 20 June.

The evidence as to the sweet potato crop is immaterial as the plaintiff is not entitled to recover damages, but it was also properly excluded upon the ground that there was no allegation to support it, and because there is nothing to prove that such damage was reasonably within the contemplation of the parties.

Affirmed.

G. A. BARFOOT ET ALS., PROTESTANTS, v. M. L. WILLIS.

(Filed 1 October, 1919.)

Entry—Navigable Waters—Riparian Owners—Wharfage—Statutes.

Navigable water is not subject to entry (Rev., sec. 1693) except by the riparian owner for wharfage purposes. Rev., sec. 1696.

APPEAL by defendant from *Daniels, J.,* at June Term, 1919, of CARTERET.

This is a protest to an entry.

The enterer went in front of protestant's lots and attempted to fill in navigable water by building sand fences, and then laid his entry.

On the trial the following judgment was rendered:

This cause coming on to be heard before his Honor F. A. Daniels, judge, and a jury, at the conclusion of the plaintiff's evidence the protestant asked the court to rule that upon his testimony the land was, at the time of filing his entry, covered by water at average tide, both before he built the sand fences and since they have been removed. The enterer admitted that he was not the riparian owner, that the land entered was covered by water at average tide, and that the sand fences that had been built prior to the entry had been removed, and that it was now navigable water. The court so held and dismissed the entry.

It is therefore considered and adjudged by the court that the enterer is not entitled to maintain the entry, is not entitled to a grant, that the entry is invalid and void, and that enterer pay the costs, to be taxed by the clerk.

F. A. DANIELS,
Judge Presiding.

The enterer excepted and appealed.

E. H. Gorham and D. L. Ward attorneys for protestant.
Julius F. Duncan attorney for enterer.

ALLEN, J. The admissions contained in the judgment clearly show that the attempted entry is unauthorized and of no legal effect.

The water, being navigable, was not the subject of entry (Rev., sec. 1693) except by the riparian owner for wharfage purposes (Rev., sec. 1696), and the enterer is not a riparian owner.

Affirmed.

R. P. SINGLETON v. W. B. ROEBUCK.

(Filed 1 October, 1919.)

1. **Appeal and Error—Objections and Exceptions—Competent in Part—Requests for Instructions.**

A general objection to evidence which is competent as corroborative will not be sustained, the remedy being for the appellant to ask that it be restricted to that purpose.

2. **Evidence—Witnesses Instructed—Presumptions.**

Where the court directs a witness not to testify except as to competent matters specified by it, it will be assumed on appeal, nothing to the contrary appearing, that the witness understood the direction of the court and observed it.

3. **Evidence—Deeds and Conveyances—Descriptions—Locus in Quo—Possession.**

When relevant to the inquiry, a party to an action involving title to lands may testify, when within his own knowledge, that his deed covered the lands in dispute, and that he had been let into possession thereof.

4. **Evidence — Description — Corners—Appeal and Error—Prejudice—New Trials.**

A witness may state that he knew where the stump to a corner pine was located, when relevant to the inquiry in an action involving title to lands; and were the evidence incompetent it must be prejudicial to be reversible error.

5. **Boundaries — Deeds and Conveyances—Declarations—Evidence—Interest —Ante Litem.**

Where boundaries to lands are in dispute, and the judge has cautioned the witness not to testify to the declarations of living or interested persons, etc., a general objection to this evidence will not be sustained, the rule being that declarations concerning boundaries must have been made *ante litem motam,* that declarant be dead when they were offered, and be a disinterested person, and it will be taken that the rule was complied with, unless the contrary appears.

6. **Instructions—Title—Burden of Proof.**

Where the instruction of the trial judge has placed the burden upon the plaintiff to show his own title, and it was stated that he can only recover thereon and not on the weakness of the defendant's title, the further statement that the defendant took chances of failing to show defects in his adversary's title in not introducing evidence will not be construed into an instruction that he must introduce evidence in rebuttal of plaintiff's testimony but only that it was his duty to go forward with his proof.

7. **Appeal and Error—Exceptions.**

Exceptions to instructions given by the court to the jury will not be sustained if they cover, in part, instructions that were properly given, for the defendant should separate the good from the bad and except only to the latter.

8. Limitations of Actions—Adverse Possession—Color of Title—Instructions.

Upon the question of adverse possession under color to ripen title to lands, where there is evidence that the claimant had been in such possession for seven years or more, and the judge has so stated the contention, an instruction by the court that they should find for the claimant if they so found the facts, is not equivalent to an instruction that he must have been in possession for more than the seven years, but only that it must have continued for that period as the minimum one.

ACTION tried before *Guion, J.,* and a jury, at May Term, 1919, of PITT.

This action was brought to recover the land described in the complaint. Defendant denied plaintiff's title and alleged ownership in himself. There was a controversy as to the location of lines and boundaries, which presented the question in dispute as to the true ownership.

Verdict and judgment for defendant, and plaintiff appealed.

Albion Dunn and S. J. Everett for plaintiff.
Julius Brown, F. C. Harding and D. M. Clark for defendant.

WALKER, J. The record in this case has been amended under a writ of *certiorari.* As the record was originally, it appeared that the court had ruled out certain testimony of a witness, Noah Moore, to the effect that Roebuck had bought wood which had been cut from the land. This was competent and if no amendment had been made there would have been error. But the amendment has removed it from the case.

First. There was general objection to evidence which was, at least, competent as corroborative, and plaintiff did not ask that the evidence be restricted to that purpose. The objection fails. Rule of this Court, No. 27; *Dunn v. Lumber Co.,* 172 N. C., 129; *Ricks v. Woodard,* 159 N. C., 647. This applies to testimony of Mr. Roebuck as to declarations of Mr. Gray and Mr. Perkins. Besides, the court warned witnesses not to speak of anything said by persons who are living or who were interested at the time in the controversy. We must assume that the witnesses understood the caution and observed it.

Second. It was competent for defendant to state that his deed covered the land in dispute and that he was let into possession of the same. Why not? He was stating facts within his knowledge.

Third. The question as to the Crandall corner and the answer thereto were properly admitted, in the absence of proper objection. The question was, in form, competent, and the answer that Perkins showed the corner to the witness was corroborative of Perkins, who had before been examined as a witness about it. Under a general objection it was competent. Rule 27 and cases *supra.* His Honor, too, again repeated the warning as to statements of living or interested declarants.

Fourth. It was competent for the witness, when asked about the corner at the pine, to state that he knew where the stump was, and, besides, it appears to have been harmless and not prejudicial (*Buckner v. R. R.,* 164 N. C., 201), and is not of sufficient importance, if erroneous, to cause a reversal. There are several of the many exceptions to evidence which are covered by the court's caution and instruction to the witnesses not to state anything told to them by living or interested persons. We will not consider them *seriatim.* It is sufficient to say that the judge required the witnesses to comply with the rule, as to declarations concerning boundaries, established by this Court, and thus stated: "It is the law in this State that under certain restrictions both hearsay evidence and common reputation are admissible on questions of private boundary. *Sasser v. Herring,* 14 N. C., 340; *Shaffer v. Gaynor,* 117 N. C., 15; *Yow v. Hamilton,* 136 N. C., 357. The restrictions on hearsay evidence of this character—declarations of an individual as to the location of certain lines and corners—established by repeated decisions, are: That the declarations be made *ante litem motam;* that the declarant be dead when they are offered, and that he was disinterested when they were made. *Bethea v. Byrd,* 95 N. C., 309; *Caldwell v. Neely,* 81 N. C., 114." *Hemphill v. Hemphill,* 138 N. C., 504. Most, if not nearly all, of the objections may be thus fully met without further discussion. The surveyor's testimony, as to the Jesse Griffin land division, if erroneously admitted, was harmless. It was immaterial, having no connection with the controversy, and the same may be said of the testimony of J. J. Gray. He might show where his corner was if he knew its location. If material, it was competent, and if immaterial, as claimed, it worked no harm and certainly no substantial harm.

Fifth. Plaintiff complains that the court did not sufficiently caution witnesses and the jury as to declarations of living or interested witnesses, but we think that he did do so, and in language that could not be misunderstood.

Sixth. As to the charge, we do not think that plaintiff's criticism of it is warranted. The court placed the burden, at the outset, distinctly upon the plaintiff. He stated that the latter must recover, if at all, upon the strength of his own title and not upon the weakness of the defendant's, and that no burden rests upon the latter. It is all upon the plaintiff. He could not have been more explicit or correct on this part of the case. The defendant was not required, by the law, to introduce any evidence. He might rely on that of the plaintiff and on his ability to show that plaintiff's contention on his own showing was erroneous, and that he had not located his land or proved his right to recover. The court was arraying the contentions of the parties and its meaning was that if plaintiff had offered evidence which satisfied them by its preponderance that his claim was correct, he was entitled to their verdict, and that if the defendant had not introduced evidence tending to show, and sufficient to show, that plaintiff was mistaken in his contention he would be taking a chance to lose the verdict. He was balancing the contentions of the parties as against each other. The language, if prejudicial to either side, was more against the defendant than against the plaintiff, for there was no burden on the former at all. It was the duty of plaintiff to make out his case and not to rely on the inability of the defendant to sustain his contention or to show any title.

Speaking of the burden of proof in ejectment, the Court says in *Moore v. McClain,* 141 N. C., 473, 478: "The plaintiff having shown a *prima facie* title, it behooves the defendants to show a superior title. The burden of proof upon the issue was upon the plaintiff. She alleged title and the defendants denied it. Showing a *prima facie* title did not shift the burden of proof upon the issue but imposed upon the defendants the duty of 'going forward' with their evidence. The distinction is clear and well illustrated in *Meredith v. R. R.,* 137 N. C., 478, and *Board of Education v. Makely,* 139 N. C., 31." That is what the judge evidently meant in this case, not that the defendant was required to offer any evidence at all, but that if he did not do so, while it was still his right to attack and overcome his adversary's case, he might take the risk of any adverse verdict if he failed to go forward with evidence. He could not well have intended anything else, as he had already told the jury that the burden of proving his case rested upon the plaintiff throughout the trial. The meaning of the court, as we have stated it, is made perfectly plain by the following instruction: "I charge you further that, in connection with the defendant's chain of title, he has offered in evidence his grant and chain of title for the purpose of showing that his grant and deed cover the same land as is contended to be covered by plaintiff in his grant and deed, not for the purpose of establishing title in himself, because there is no burden upon defendant to establish title in him, because plaintiff himself must establish his own title, but the defendant has offered such evidence which he contends ought to be sufficient to satisfy you that the weight of plaintiff's evidence is not sufficient to locate the land contended for by him."

It may be further stated that as there are some parts of the charge to which this exception is taken which are clearly correct, and as plaintiff has not singled out the erroneous part, his exception must fail. *Nance v. Telegraph Co.,* 177 N. C., 313; *S. v. Evans, ib.,* 564, at 570, and cases cited; *S. v. Ledford,* 133 N. C., 722. We said in the *Nance case, supra:* "Defendant should have separated the 'good from the bad' and objected only to the latter, as the objection must be valid as to the whole of the testimony. We will not set off the bad for him and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part. He must do that for himself. This is the firmly established rule."

The thirteenth assignment of error, the last one being merely formal, is subject to the same objection. The particular error is not pointed out and excepted to, there being several different propositions in the instructions, some of which are plainly correct. *Nance v. Telegraph Co., supra.*

But when the entire charge is considered, especially the statement of defendant's contention, it is apparent that the court did not mean that it required more than seven years adverse possession to ripen the title but seven years or more would be sufficient, and the jury so understood it. He indicated seven years as the minimum period, and the expression was doubtless used because the evidence showed such a possession for more than seven years, and the judge had stated the plaintiff's contention to be that he had occupied the land adversely for more than seven years, or "for seven years and upward," without any correction from the plaintiff. The court sufficiently instructed the jury that they should decide with the plaintiff, if they found that he had been in adverse possession, as had been contended by him.

There was no substantial error in the rulings or charge of the court, if error at all, and even if there was slight error, it is not of sufficient importance to warrant a reversal (*Griffin v. R. R.*, 138 N. C., 55), and the instruction as to adverse possession was responsive to plaintiff's contention, as stated by the court, and not questioned at the time by him. *Griffin v. R. R., supra.*

The case has been correctly tried, as we think, without prejudice to any just right of the plaintiff.

No error.

DAVID L. DIXON v. CLARA GREEN.

(Filed 1 October, 1919.)

1. **Pleadings—Interpretation—Facts Alleged.**

A pleading, under the provisions of Rev., sec. 495, is to be liberally construed, with every intendment favorable to the pleader, and if any portion of it, or if it to any extent, presents facts sufficient to constitute a cause of action, or if such facts may be fairly gathered from it, however inartificially it may be drawn, or however uncertain, defective or redundant may be its statements, it will be construed as sufficient.

2. **Same—Deeds and Conveyances—Fraud—Undue Influence.**

In a complaint to set aside a deed for fraud or undue influence, the use of these words are not required for the sufficiency of the allegations, if it appear from the pleadings that the facts alleged are in themselves sufficient, by correct interpretation, to constitute the fraud or undue influence relied upon.

3. Deeds and Conveyances—Fraud—Undue Influence.

While it is not required that the grantor in a deed, sought to be set aside for fraud or undue influence, exercised by the grantee in inducing its execution, should have been a lunatic at the time, equity will grant relief if he has been so weakened by old age, in mind and body, as not to be able to resist the grantee's imposition or excessive importunity, if it be further shown that the grantor has been actually imposed upon by the use of either of these means, by the stronger mind of the one using them, who stood in the confidential relation of a friendly adviser, in whom sole and implicit reliance in the matter had been placed by the grantee, though weakness of the grantor's mind or inadequate consideration will not, alone, be sufficient.

4. Same—Pleadings—Issue—Demurrer—Appeal and Error.

The refusal of the court to submit an issue as to undue influence in the procurement of a deed, the grantor seeks to set aside upon the ground that it has not been sufficiently pleaded, has the effect of a demurrer to the sufficiency of the allegations thereof, and they will be assumed to be true on appeal.

5. Deeds and Conveyances—Undue Influence—Fraud.

Undue influence in the procurement of a deed is not always, though frequently, fraudulent, and such influence exists where the will of the person having the stronger mind is substituted for that of him who has the weaker one; and where such influence is paramount and used for the benefit or advantage of the one exercising it, or for a selfish purpose, as is alleged in this case, and the deed has accordingly been executed to him. the law regards it as fraudulent.

6. Pleadings — Answers—Inconsistent Defenses—Deeds and Conveyances—Undue Influence—Fraud.

A defendant may plead contradictory or inconsistent defenses, as in this case, that she had not executed a deed for lands to the plaintiff, the subject of the controversy, and that if she had done so it was procured by fraud and undue influence, etc.

7. Appeal and Error — Issues—Issue Tendered—New Trials—Verdict Set Aside—Interdependent Issues.

Where the trial judge has erroneously refused to submit an issue tendered by a party to the action, and this and the issues submitted and found against him are somewhat interdependent, and injustice may be done him by granting a new trial only under the issue refused, the Supreme Court may set aside the answers to the issues submitted, and direct a new trial under all of the issues.

ACTION tried before *Guion, J.*, and a jury, at June Term, 1919, of LENOIR.

The plaintiff sued for the recovery of a lot in Kinston. He alleged ownership and right of possession, and the defendant's unlawful withholding of the possession from him. The defendant denied plaintiff's allegations, except as to her possession and the plaintiff's demand for the possession, and further denied that she executed to the plaintiff the deed under which he claims the land, and averred that if she did execute it she did not, at the time, have sufficient mental capacity to do so, being then very old, about 78 years of age, and greatly enfeebled in mind and body and very decrepit, and her mental faculties impaired by the infirmities of old age and by "wretched physical health." That her daughter had advised her to come to New York where she resided, presumably so that she might care for her. We will state the remainder of her averments in her own language. While in this enfeebled mental and physical condition, as above described, "the question arose as to what would be done with her interest in said lot; she talked the matter over with the plaintiff, who was her next-door neighbor and in whom she had implicit confidence, and she did state to said plaintiff, upon his suggestion that he would take the land while she was away, that she would be willing to let him have it if she went to New York at the rate of $25 per year, and at the same time she expressly stated to the plaintiff that it was her dower right and her only home, and that she had refused many times to sell it for large and valuable considerations, and that under no conditions would she part with her home so that she could not return to it. That she does remember agreeing that the said plaintiff might have the use of the lot of land during her absence at the rate of $25 per year, with the understanding that she in no way released her life estate therein, and should have her home returned to her when she returned to Kinston, but she denies that she ever agreed to anything else and she has no knowledge of any other understanding. And furthermore, this defendant alleges that the plaintiff expressly stated and promised her in his conversation on the subject that she should not be disturbed in her home, and that the transaction that he referred to was for her protection, and that he was only to have the land during her absence from Kinston, and at the same time he proffered and offered his help in getting away from Kinston, and promised that if necessary he would help her in returning to her home when she desired to return, and that in all these promises and conditions this defendant absolutely and implicitly relied upon the plaintiff to carry same out as same were understood by her and stated to her. That the plaintiff well knew and understood the weak and decrepit physical and mental condition of this defendant at the time hereinbefore mentioned, and well knew that she was a very aged colored woman, and had no knowledge of business transactions, and further well knew that she relied upon him to protect her, and the promises, statements and representations herein made were made with such knowledge on the part of the plaintiff were relied upon by the defendant and served as an inducement upon which she acted. Whatever action she took at the time, and the only action which she knows of or understood, however, being the verbal agreement herein referred to. That the said lot of land is a valuable lot in the city of Kinston, on McIlwean Street, being one of the principal residential streets of the city, and being in a section where many of the most desirable citizens of Kinston reside, and constituting one of the most desirable residential sections of said city. That the said lot is in dimensions 80 feet front on McIlwean Street by 169 feet deep, and that its rental value with the small house upon it in which this defendant resides would be at least $100 per year. That the consideration appearing in the purported paper-writing under which plaintiff claims is so grossly inadequate, and especially considering the conditions hereinbefore set forth, and the difference in station, ability and standing of the parties, that this defendant is informed, believes and avers that in equity the said consideration would necessarily shock the conscience of the court, and would not support an absolute deed to the life estate of the defendant to the said lot, even if such deed has been executed, which latter matter of the execution of the said deed is expressly denied. That the defendant is informed, believes and avers that upon all the facts herein alleged the court of equity will not permit the plaintiff to recover possession of the lot of land by virtue of the purported paper-writing herein referred to, and that said paper-writing is a cloud upon defendant's life estate, which she is entitled to have removed, and that said paper-writing is absolutely invalid and void. That further, this defendant now being eighty years of age and in weakened physical condition, unable most of the time to leave her bed, has no other property whatever except her interest in the lot herein set forth. That she is absolutely without any other home, and that if the court should sustain the alleged paper-writing under which the plaintiff claims in this case it would result in taking from the defendant her home and leave her without any place of abode whatsoever."

There is a prayer for the proper relief. The court refused to submit issues tendered by the defendant as to fraud or undue influence, or to hear evidence offered by the defendant upon any such issues as defendant has denied the execution of the deed. Defendant excepted. The court then submitted issues as to the execution of the deed, defendant's mental capacity and plaintiff's ownership of the land, which the jury answered in favor of plaintiff. Judgment upon the verdict, and defendant appealed.

Rouse & Rouse for plaintiff.
Cowper, Whitaker & Allen and J. L. Hamme for defendant.

WALKER, J., after stating the case as above: The only question before us is the sufficiency of the answer to raise the issues tendered by the defendant regarding fraud and undue influence. We are required by the statute (Rev., sec. 495) to construe a pleading liberally, and in enforcing this provision we have adopted this rule: that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. This is what we held in *Blackmore v. Winders,* 144 N. C., 212, and more recently in *Brewer v. Wynne,* 154 N. C., 467; *Renn v. R. R.,* 170 N. C., 128, 136; *Lee v. Thornton,* 171 N. C., 209.

There is no magic in using the word "fraud," as a term, in order properly to plead fraud, nor is it necessary to state "undue influence" in those words in order to rely upon such a plea. It is sufficient to state the facts from which fraud and undue influence arise. While this has been held in numerous cases there is a good statement of the doctrine in 12 R. C. L., at p. 417, sec. 164, to this effect. While fraud must be clearly charged, it is not necessary to allege it in terms if the facts alleged are such as in themselves constitute fraud, or if so alleged that fraud may be inferred or presumed, for the acts charged are not less fraudulent because the word "fraud" or "fraudulent" is not employed by the pleader in characterizing them. In other words, an allegation of facts from which the conclusion of fraud may result is sufficient.

Now as to what is sufficient to constitute fraud or undue influence. Although the plaintiff be not a lunatic or insane, yet if her mind was so weak that she was unable to guard herself against imposition, or to resist importunity or the use of undue influence, equity will grant her the relief she seeks, provided it be shown that she has been imposed upon by the use of either of the means enumerated. Mere weakness or inadequate consideration, however, will not be sufficient. A court of equity cannot measure the understandings or capacities of individuals. Where there is a legal capacity there cannot be an equitable incapacity apart from fraud. 1 Fonbl. Eq., B. 1, M. 2, S. 3. If she be of sane mind she has a right to dispose of her property, and her will stands in place of a reason, provided the contract or act justifies the conclusion that she has exercised a deliberate judgment such as it is, and has not been circumvented or imposed on by cunning, artifice, or undue influence, means abhorrent to equity, and constituting fraud. *Rippy v. Gant,* 39 N. C., 445. "The mere fact that a man is of weak understanding, or is below the average of mankind in intellectual capacity, is not of itself an adequate ground to defeat the enforcement of an executory contract or to set aside an executed agreement of conveyance. But where mental weakness is accompanied by other inequitable incidents—such as undue influence, great ignorance and want of advice, and inadequacy of consideration—equity will interfere and grant either affirmative or defensive relief." Eaton on Equity, p. 317; *Sprinkle v. Wellborn,* 140 N. C., 173, 174. *Lord Hardwicke,* in *Earl of Chesterfield v. Janssen,* 2 Vesey Sr., 125, said there is a third kind of fraud, in his classification which has been generally adopted, which may be presumed from the circumstances and conditions of the parties contracting; and this goes further than the rule of law, which is that it must be proved and not presumed; but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance. The subject is fully discussed in *Sprinkle v. Wellborn, supra; Pritchard v. Smith,* 160 N. C., 79, and in *Hodges v. Wilson,* 165 N. C., 323, where the cases are collected and the limitation of the doctrine with respect of fraud in conveyances is properly limited. See, also, the following other cases decided by this Court: *Smith v. Beatty,* 37 N. C., 456; *Suttles v. Hay,* 41 N. C., 124; *Mullins v. McCandless,* 57 N. C., 425; *Hartly v. Estis,* 62 N. C., 167; *Myatt v. Myatt,* 149 N. C., 137; *Bellamy v. Andrews,* 151 N. C., 256; *Braddy v. Elliott,* 146 N. C., 578; *Buffalow v. Buffalow,* 22 N. C., 241, and *Futrill v. Futrill,* 58 N. C., 61 (*S. c.,* 59 N. C., 337). The last case, while slightly different in its facts, and in some respects not so very material, lays down the rule which should govern in cases where there is no technical or well-defined confidential relation but where there was professed friendship for the grantor, and acquired influence over him and circumstances of imposition, oppression and deceit, the grantor having become enfeebled in mind and body, and the deed having been procured when the grantor was in no condition to understand it and did not know its contents, and had no sufficient opportunity to obtain the counsel and advice of a disinterested friend, relying upon the trust and confidence he placed in the grantee instead.

With these authorities before us let us briefly review the facts as alleged in the answer, for the action of the judge in disregarding them as not pertinent and his refusal to submit issues upon them were the same as if the plaintiff had demurred to the defense so set up. We must assume these allegations to be true upon this appeal, although it may hereafter so happen that the proof will not substantiate the charge. The defendant was, at the time of this transaction, very old (now 80 years of age) and decrepit, in wretched physical health, unable most of the time to leave her bed, and without such mental capacity as would enable her to execute a deed understandingly. She was going to New York to spend a while with her daughter and wished to lease her home while she was absent. She had been offered many times a large price for it, and had refused to sell. In this situation she thought of the plaintiff as being her neighbor who lived next door to her, and who had ostensibly been a friend in whom she had placed "implicit confidence." She turned to him for succor, and upon his suggestion that he would take the land while she was gone, she stated to him that she would take twenty-five dollars per year if she did go to New York, remarking at the time that it was her dower and her only home, and that under no condition would she part with this land so that she could not return to it, and it was agreed that it should be returned to her when she came back to Kinston, so that she should not be disturbed in her home. That this was the only understanding. That he promised to help her go to New York and return to her home, and she relied upon all these promises when she signed the paper. That the plaintiff well knew of her weak and decrepit condition and of her age, and also that she relied upon him to protect her; and his promises and his attitude towards her were the inducements to sign the paper. The said lot is a valuable one, being situated on one of the principal residential streets and is one of the most desirable lots in the city of Kinston, it being 80 feet in width by 169 feet in length, and its rental value is at least $100 per year. That the consideration stated in the deed held by the plaintiff is a grossly inadequate one (being only twenty-five dollars annually so long as the grantor lives); so gross that it would "shock the conscience and moral sense of the court." That the difference in the station, ability, and standing of the parties is very great, defendant being the weaker of the two. That if the lot is taken from her she will be left without any place of abode. Upon the allegations, and in accordance with the precedents, we are of the opinion that the case should be submitted to the jury upon both issues—fraud and undue influence. The latter, while generally classed under the title of fraud, is not necessarily a fraudulent influence though it frequently is so. It is a controlling influence when the weaker succumbs to the stronger and the latter's will is substituted for that of the former. It is a paramount influence, and when it is used for the benefit or advantage of him who exercises it for such a selfish purpose it may well be called "fraudulent," and the law so regards it; but there may be cases where it is not actually fraudulent but in a moral sense innocent though not harmless.

In this case we have allegations sufficient to show fraud and undue influence, viz.: mental and physical weakness and imbecility, extreme old age, grossly inadequate consideration, greater superiority of the one over the other, the relation of friend and advisor, and consequent full confidence of the weaker in the stronger and reliance on him, the necessitous condition of the defendant, and finally an allegation of a virtual misrepresentation as to the contents of the deed, which is an absolute conveyance of the land, and not a lease, founded upon a small consideration.

The defendant could plead double, and set up inconsistent or contradictory defenses. *McLamb v. McPhail*, 126 N. C., 218; *Williams v. Hutton*, 164 N. C., 216; Clark's Code (3d Ed.), sec. 245; 1 Pell's Revisal, p. 226, sec. 482, and note with cases.

It may be that in the development of the case the defendant's proof may not sustain her allegations of fraud and undue influence, but what she has charged is sufficient in law and entitles her to be heard before the jury.

As the issues will be somewhat interdependent and injustice may be done by allowing them as now answered to stand, we direct that they be set aside and that the whole case be tried again upon all of the issues which are raised by the pleadings, and it will be so certified.

New trial.

EDENTON COTTON MILLS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 8 October, 1919.)

1. **Interstate Commerce—Freight Rates—Illegal Rates—Contracts—Bills of Lading—Knowledge—Representations—Federal Statutes.**

The intent and purpose of U. S. Compiled Statutes (1916), secs. 8569 and 8574, under the title of "Interstate and Foreign Commerce," is to prevent any discrimination as to interstate freight rates for the transportation of commodities of the same classification among shippers and an agreement for the carrier to receive or the shipper to pay a different or less rate of freight than determined upon by the Interstate Commerce Commission, directly or indirectly, whether existing with or without the knowledge of either or both of the contracting parties at the time, and irrespective of any representations made, is unenforcible and void; and where the shipper has contracted in his bill of lading to pay a less rate than that prescribed by the law, and, relying upon the assurance of the carrier to endeavor to obtain a refund, pays the difference between that and the lawful rate, he may not recover this difference in the courts of our State, the contract sued on being an illegal one as encouraging rebates and unlawful discrimination and not recognizable therein.

2. **Interstate Commerce—Commerce Commission—Rates—Overcharge—Carriers—Agreement—Anticipated Adjudication—Courts.**

Where the carrier in interstate commerce has failed in its promise to present duly and in proper form the shipper's claim for an alleged overcharge of freight rate which the latter had paid to the carrier, and thus prevents the shipper from presenting his own claim within the time allowed by the statute, and consequently said commission, having then no authority, refuses to pass upon the matter at all, our courts may not adjudicate the question, the same being for the determination of said commission upon whatever evidence may have been introduced before it, and as its determination thereon, favorable or unfavorable, cannot be anticipated or foreseen, any assessment of damage based upon it would be purely speculative and not allowable.

ACTION tried before *Devin, J.,* at Spring Term, 1919, of CHOWAN.

The action, as it appears from the pleadings, was brought to recover certain alleged freight overcharges for goods shipped by the plaintiff over the lines of defendant and connecting carriers. It turns out that certain freight rates had been established with the sanction of the Interstate Commerce Commission, which afterwards were duly changed and increased in amount, but the parties to this action were not aware of the change at the time that the charges were made against the plaintiff. When the change of rates was discovered the defendant demanded the difference between the rates charged and the amount received under the old tariff and those due under the tariff of rates as amended and increased by the commission. This amount or difference was paid by the plaintiff, and it now alleges that the defendant entered into a special agreement with it as follows:

"1. The defendant undertook, promised and agreed, for and on behalf of plaintiff, that it would take charge of, present, and submit the same (that is, its claim for reparation) to the said Corporation Commission in proper form and manner and in due time for adjustment and allowance, and time and again, when this plaintiff would call upon it for settlement, stated to this plaintiff that it was then attending to the matter and would have the same presented in reasonable time; which undertaking, agreement and promise this plaintiff reasonably relied upon.

"2. Notwithstanding the defendant's undertaking, promise and agreement aforesaid, and notwithstanding it had assumed the duty aforesaid to this plaintiff, the defendant neglected and wrongfully failed and refused to do its duty, as it had agreed to do and in justice and right was required to do, until more than two years after the plaintiff had paid the overcharges as demanded by the defendant and had suffered the damage aforesaid, and after all right and power to consider and allow the same were by lapse of time denied the Interstate Commerce Commission under the law.

"3. The claims and demands of the plaintiff aforesaid were, after a lapse of two years from the time the right of demand accrued, presented to the said Interstate Commerce Commission and that commission disallowed the same solely upon the ground that because of the delay aforesaid it was not permitted by law to consider the same.

"4. That but for the promise, undertaking and assurance of the defendant, as hereinbefore set out, and but for the reliance of the plaintiff on the same and its belief that the defendant was performing its duty as it had undertaken to do, this plaintiff would have presented and prosecuted before the Corporation Commission the claim aforesaid, to which there was no defense and about which there was no dispute, and would have recovered the money justly due it.

"5. That by reason of the wrongful and unlawful conduct of the defendant aforesaid, and its failure to perform its duty as hereinbefore set forth, the plaintiff has been damaged in a large sum."

There is a prayer for judgment, the amount claimed being one thousand dollars.

The defendant answered and denied the material allegations as to the contract. It denied that it had overcharged the plaintiff, and averred that the plaintiff had been charged at the established and promulgated rates, and further, that the defendant could not, under the Interstate Commerce Act, have charged any less. That the defendant could not refund any of the sums paid without the same being authorized under the said law.

The jury found against the defendant as to the contract and its breach, and allowed the amount of the excess over the rates promulgated 20 July, 1911 (the old rates), as damages. Judgment was entered upon the verdict, and defendant appealed.

J. N. Pruden and Ehringhaus & Small for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

WALKER, J. If we concede that the evidence tends to show a contract as alleged and not a mere gratuitous offer to lend its aid and assistance in obtaining a refund of the difference between the two rates as paid by the plaintiff, and also that the contract if made, as alleged by the plaintiff, was founded upon a sufficient consideration, our opinion is that the plaintiff cannot recover as the contract is illegal, it being contrary to the provisions of the law against rebating or giving undue preferences, privileges or concessions, which is made a misdemeanor by the Interstate Commerce Act, both as to persons and corporations participating in the unlawful act. U. S. Compiled Statutes (1916), Annotated, 8 Vol., title "Interstate and Foreign Commerce," secs. 8569 and 8574, and notes, where many authorities are collected. The language of the act of Congress is very stringent in regard to the duty of the shipper to pay and of the carrier to collect the schedule rates on all shipments of freight. The cases cited in notes to the sections of the compiled statutes show conclusively that the agreement for a shipment at a rate less than that prescribed cannot be recognized by the courts, and it makes no difference whether the rate has been misquoted to the shipper and received by the agent of the carrier by the mere mistake or the negligence of the latter. The only rate is the true rate as authorized by the commission. It was held in *T. and R. Ry. Co. v. Mfg. Co.,* 202 U. S., 242 (50 L. Ed., p. 1011), that where a carrier has negligently made and quoted to a shipper rates on interstate shipments of coal, upon which he has relied in contracting for the coal, selling at prices based on such rates, which were lower than the rates which had been duly published, printed and posted as required by the Interstate Commerce Act, and the carrier, as required by the act, collects the prescribed rates, the shipper cannot recover against the carrier for damages occasioned by its misrepresentation of the rates. To the same effect are *Alabama Lumber and Exp. Co. v. Philadelphia, B. and W. R. Co.,* 19 Inters. Com. Rep., 295, and *Texas and P. R. Co. v. Leslie,* 131 S. W., 824, motion for rehearing overruled, 131 S. W., 827. See, also, *Ill., etc., R. R. v. Henderson Elevator Co.,* 226 U. S., 441 (57 L. Ed., at p. 290); *Va.-Caro. Peanut Co. v. R. R.,* 166 N. C., 62. The following cases are to the same effect, as will appear by statement of the substance of each decision: "Acceptance by railroad of charge less than rate filed by mistake, not discovered till after consignee's settlement with his principal, held not to create waiver or estoppel precluding recovery of balance from consignee." *Penn. R. R. v. Titus,* 216 N. Y., 17. "A person dealing with carrier is as effectually bound by the law and orders of the commission, as to both freight and passenger tariffs, as is carrier itself, and neither is estopped to assert the illegality of contract made in violation of act and orders of commission." *Melody v. Great Northern R. R.,* 127 N. W., 543. The same was held in *B. and O., etc., R. R. v. N. A. Box and Basket Co.,* 94 N. E., 906; *La. Rwy. and Nav. Co. v. Holly,* 127 La., 615; *N. Y., etc., R. R. v. York and W. Co.,* 215 Mass., 36. An agreement of a carrier to refund a part of the rates lawfully charged and collected is in violation of the act and unenforceable. *L. and R. Co. v. Coquillard Wagon Works,* 147 Ky., 530. Carrier cannot, directly or indirectly, contract for a rate different from that specified in its schedules. *St. Louis, etc., R. R. v. S. R. Stone Co.,* 154 S. W., 465. A suit by a shipper for a loss of goods on a policy of insurance issued to the carrier, after receipt of the limited value fixed on such goods by the carrier's schedules and bills of lading, was held to be in violation of the act of Congress, amended by the act of 29 June, 1906, as seeking or soliciting a rebate or concession, and not maintainable. *Duplan Silk Co. v. Am. and For. Marine Ins. Co.,* 205 Fed., 724 (124

C. C. A., 18). A carrier may recover from a shipper who has paid the legal rate a refund made to the shipper by carrier's agent, either by mistake of carrier or through agent's illegal act. *Cent. of Ga. R. R. v. Curtis,* 82 S. E. Rep., 318; *L. and N. R. R. v. Allen,* 153 S. W. Rep., 198 (*S. c.,* reaffirmed, 154 S. W., 371); *Ga. R. R. v. Creety,* 63 S. E., 528; *Schenberger v. Union Pac. R. R.,* 84 Kansas, 79. It all comes to this, that the carrier is bound to collect and the shipper to pay the published rates, even though the agent of the carrier has by his conduct caused the shipper to pay a lower rate to his prejudice in fixing the price of his goods, or in any other way. *La. R. and N. Co. v. Holly,* 53 So. Rep., 882; *Baldwin S. and L. Co. v. Columbia S. R. Co.,* 58 Ore., 285; *So. Pac. Co. v. Frye & Bruhn,* 143 Pac. Rep., 163; *Hamlen v. Ill. Cent. R. R.,* 212 Fed. Rep., 324. Ignorance of shipper as to the correct rates will not excuse him, and he should not rely on representations of carrier or his agent as to them. *St. L., etc., R. R. v. Faulkner,* 164 S. W., 763; *Wyrick v. Mo., etc., R. R.,* 74 Mo. App., 406; *Baldwin S. and L. Co. v. Columbia S. R. Co., supra.* Those cases show strictly the courts have required carriers and shippers to live up to the letter of the law enacted by Congress for the purpose of exacting rigid compliance with the main intention, that there should be no favoritism or discrimination and no unfair competition in the form of rebates or by other methods of business. The Interstate Commerce Commission considered a question similar to the one now before us, and through Commissioner Clements it said in *Forster Bros. Co. v. Duluth, etc., R. R.,* 14 Interstate C. C. Reports, at page 236: "It is unfortunate that shippers should be misled to their injury by erroneous information furnished by representatives of carriers as to the rate in effect. It is, of course, the duty of carriers' agents to furnish correct information as to the proper application of the lawful established rates. However, the law requires that tariffs shall be open to public inspection, and therefore shippers are themselves charged with notice of the rate lawfully applicable. The commission cannot consider an erroneous rate quotation made by an agent of a carrier as the basis for an award of reparation to a shipper who thereby suffers damage. Collusion between the carrier and a shipper, which it desired to favor, for protection of other than the tariff rates would be rendered too easy of accomplishment. In such case the carrier could protect any rate which it might desire to apply by simply quoting it to the favored shipper, and thus the integrity of the published tariffs (a strict observance of which is required by law in order to prevent unjust discrimination) would be constantly violated."

This matter has been recently considered by this Court in *R. R. v. Latham,* 176 N. C., 419, where *Justice Hoke,* for the Court, says: "It is clear that defendants are responsible for the amount properly due for these shipments, both as consignors under the bill of lading presented and under the express agreement that they were to prepay the freight in protection of the designated consignee; and further, that this amount must be determined by the rates of the schedules and tariff established pursuant to law," citing *Tex. Pac. R. R. v. Mugg & Dryden,* 202 U. S., 242; *Central of Ga. R. R. v. Birmingham Sand and Brick Co.,* 9 Ala. App., 419; *Baltimore, etc., R. R. v. New Albany, etc., Basket Co.,* 48 Ind. App., 647; *Holt v. Westcolt,* 43 Me., 445; *Ashboro Wheelbarrow Co. v. R. R.,* 149 N. C., 261. *R. R. v. Mugg, supra,* is quoted with approval, where it is said: "A common carrier may exact the regular rates for an interstate shipment, as shown by its printed and published schedule on file with the Interstate Commerce Commission and posted, etc., as required by the Interstate Commerce Act, although a lower rate was quoted by the carrier to the shipper who shipped under the lower rate so quoted." And then the case of *Balto. and Ohio R. R. v. New Albany, etc., Basket Co., supra,* where the Court held:

"(1) One who engaged a railroad company to transport freight in interstate commerce is liable for the established rate on such freight regardless of any contract the shipper may have with the consignee.

"(4) A shipper must take notice of the rates for interstate shipments, and he relies at his peril on the statements of the carrier's agents.

"(5) An interstate carrier is not estopped from recovering the balance due for a shipment by the unauthorized act of its agent in quoting an illegal freight rate."

And, finally, the case of *Cent. of Ga. R. R. v. Birmingham Sand and Brick Co., supra,* where the same rule was thus stated: "Under the Interstate Commerce Act the freight rate of an interstate shipment is not that named in the bill of lading or contract of shipment, but the lawful rate existing at the time, whether or not such rate is known to the consignor or the consignee, and regardless of whether the parties were misled by the carrier as to the lawful rate or whether it had posted the lawful rate as required by the statute; hence the carrier cannot by any act estop itself from demanding the lawful rate. So that the principle is firmly settled that the only rate is the rate fixed by the Interstate Commerce Commission and published, and no contract, agreement or understanding between the parties can change it."

In this case, if recovery by the plaintiff were adjudged, he would be given a rate for the transportation of his goods and wares which would be less than that allowed to other shippers. It is no answer to the assertion to say that plaintiff would merely be recovering damages for a breach of contract and not recovering a favor from the defendant by a reduction of the published rate, contrary to the express provision of the act forbidding any concession, privilege or discrimination. It is not the manner of showing a favor to the plaintiff so much as the substance of it that we must consider in passing upon the question whether there has been either a direct or indirect violation of the law. If the resultant effect is bad and comes within the prohibition it matters little what particular form it takes. The clear and ultimate result is that plaintiff will have had his goods hauled at a less rate than that which was published at the time the service was rendered. If defendant can be compelled to pay the difference by an action in court, it can pay it just the same without such an action, that is, voluntarily. All it will have to do then, in order to circumvent the act and give the plaintiff what is, in affect, a rebate, is what has been done here, contract to render service in obtaining reparation for the amount paid in excess of the mistakenly supposed rate, and then refuse to perform the contract and instead pay the damages. Such a course would open the door wide for collusion and corrupt bargaining to violate the law, and would therefore be against public policy as declared by the act which seeks to compel equal and impartial service to all alike, and to abolish rebates and discrimination in any and every form as being in violation of the very terms of the act and opposed to the wise policy inaugurated by it, which was so firmly enforced in *Duplan Silk Co. v. Am. and For. Marine Ins. Co., supra.* There the defendant paid the stipulated value of one dollar per pound for the silk carried by it and lost in a marine disaster to one of the carrier's boats. The plaintiff sued on a marine policy, but the court held, as we have shown, that he could not recover as, though the suit was a collateral one, and not against the carrier, it was forbidden by the Interstate Commerce Law, as amended by sec. 6 of the act of 29 June, 1906 (Hepburn Act), 34 Stat., at L. 584, prohibiting the carrier to give, or the shipper to receive or solicit, any rebate or concession for schedule rates, and no question as to the right of the shipper to recover otherwise on the policy was considered, the decision being confined to the single point above stated.

Where a contract for services is made with an illegal design in view, or for enabling the beneficiary to accomplish an unlawful object, no recovery will be allowed upon it. 9 Cyc., 573; Clark on Contracts (2d Ed.), p. 254 *et seq.* The Court said in the *Duplan Silk case, supra:* "The libellant argues that the giving of marine insurance by the railroad company is not a rebate, facility or concession connected with transportation within the meaning of the act. We think this altogether too technical. No one could contend that a carrier which charged its published rate of freight could unlawfully agree in addition to pay the shipper's life insurance or office rent or wages of any of his employees. It is next urged that this insurance was not a discrimination because it was given to all shippers equally. Nevertheless it was a violation of the act by the carrier, because not stated in its tariff schedules. Indeed, the express contrary was stated, viz., that the carrier would not assume marine insurance unless it was specifically provided for. And the libellant, even though not aware of the insurance at the time the goods were shipped, is by this suit violating the act, inasmuch as it is knowingly soliciting a concession by which its shipment was being 'transported at a less rate than that named in the tariffs published and filed by such carrier.' *American Exp. Co. v. U. S.*, 212 U. S., 522; 53 L. Ed., 635; *Chicago, St. P. M. and O. R. R. v. United States*, 162 Fed., 835, 90 C. C. A., 211. If the libellant recover in this suit it will get at the expense of the railroad company the full value of its shipment as if it had paid three times first-class freight, when it is only entitled to the agreed value on the freight paid." It was, therefore, held there that it was a clear case of soliciting for an advantage or favor beyond that allowed to other shippers, and in our case the plaintiff asks to recover on a special contract for the rendering of a service which is not specified in the carrier's schedule of rates, and a service, too, not granted or promised to the other shippers over its line. By this seeking to gain an advantage over others the plaintiff, by this suit, is, according to the authorities, itself guilty of violating the Interstate Commerce Act. A similar view was taken by the Circuit Court of Appeals in *Washington, etc., R. R. v. Mobile and O. R. R.*, 255 Fed. Rep., 12, at p. 14, as follows: "Defendants make the proposition that, after having received money in payment of a freight charge the Mobile and Ohio had the right to do with it as it pleased, and the right to give it to the Washington and Choctaw if it so desired. This proposition cannot receive the sanction of the courts. It is a mistake to assume that the railroad companies may do as they please with that which they receive. They are public corporations, charged with public duties, and those duties cannot be performed without a proper conservation and administration of their revenues. The rate-making bodies of the country must see to it that reasonable rates are fixed, with the view of enabling the companies to perform their public duties. The proper fixing of rates is inconsistent with an unrestrained right upon the part of the railroad companies to donate or otherwise dispose of their funds, except for the purposes and in the manner contemplated by the laws. Even if this general proposition could be controverted there could be no question about the duty of railroad companies to conform their interstate transactions to the terms of the Interstate Commerce Act. Tariffs and divisions would be rendered nugatory if the interested companies could, by repayments and readjustments of accounts, bring about any result they might desire as between themselves and connecting lines or between themselves and shippers. It is the right and the duty of railroad companies which have improperly paid out money to connecting lines under a mistake of fact, or with knowledge of the unlawful character of payment, to recover such payments. The conclusions reached, and so well stated by the trial judge, are concurred in entirely."

But there is another ground upon which plaintiff's recovery may be defeated. If defendant can be sued upon the alleged contract there is no way of determining with any certainty in law how the Interstate Commerce Commission would have decided the case, if it had been properly constituted before it and diligently prosecuted by the defendant carrier, in behalf of the plaintiff, if such a proceeding would have been permitted by the commission at all. It is a judicial question, and there is no way of foreseeing or foretelling what the decision would have been, or of knowing in advance what would be its conclusion, whether in favor of the shipper or the carrier. It may have ordered reparation to be made, or it may have refused to do so, in the exercise of its own judgment as to the law and merits of the case. There is no possible way, therefore, of telling beforehand whether there would be any order for reparation or for the return of a part of the money paid on the freight charges. It would be highly unseemly for a court to fortell its own opinion of a case and what the decision would be if it were brought before it, and no respectable court would do such a thing, nor should any such wrong be imputed to it. Even if it should do so its opinion could be changed when the facts are developed, at any time before the decision, and it would be its duty to change it. So we are unable to say, in advance of a decision, whether the plaintiff would sustain any damages. They are, therefore, too uncertain and speculative to be safely estimated. *Machine Co. v. Tobacco Co.,* 141 N. C., 284; *Wilkinson v. Dunbar,* 149 N. C., 20; *Hardware Co. v. Buggy Co.,* 167 N. C., 423; *Coles v. Lumber Co.,* 150 N. C., 183. We need not decide the question, which has been raised, whether there is any consideration for the contract, apart from its illegal nature and the uncertainty as to any loss from a breach of it.

But the principal ground of decision is that the tendency of such a contract, and its probable if not inevitable effect, would be to violate one of the important provisions of the Interstate Commerce Act, the one against rebates and discrimination among shippers, which was enacted to protect them and the public against such unfair and collusive agreements.

The motion for a nonsuit should have been sustained, and for this error we reverse the judgment and order the action to be dismissed.

Reversed.

NEW HANOVER SHINGLE COMPANY ET ALS. v. JOHN L. ROPER LUMBER COMPANY ET ALS.

(Filed 8 October, 1919.)

1. **State's Lands—Board of Education—Title—Presumptions—Rebuttal.**

The presumptions in favor of the title to State's swamp lands in favor of the board of education as successors to the "Literary Fund," are expressly excluded by the statute (Rev. Stat., ch. 67, sec. 3) when such lands have been theretofore entered and granted to individuals by the State, the presumption lasting only "until the other party shall show that he hath a good and valid title," and one claiming under a grant issued before the enactment of the statute, and connecting his title by mesne conveyances therewith, is entitled to recover against the one claiming under said board, unless his adversary can otherwise show a good title thereto.

2. **Taxation — Deeds and Conveyances — Statutes — Sheriffs—Settlement—Evidence—Declarations.**

One claiming title to lands under a tax deed given by the sheriff to the Governor in settlement for his taxes under Rev. Stat., ch. 102, sec. 60 *et seq.*, must make it sufficiently appear that the statute, strictly construed, was complied with, and the deed will be declared inoperative to pass the title when it does not appear that it was acknowledged in open court or that it has been registered in the clerk's office, as required by the statute, or that the sheriff had produced and filed the deed in the Secretary of State's office, etc.; and a recital in the attestation clause of the sheriff's deed that the deed was acknowledged in open court, and not made by an officer authorized to take acknowledgments, is alone insufficient as to such fact, and is only the unsworn declaration of the sheriff.

APPEAL by plaintiffs from *Guion, J.*, at April Term, 1919, of ONSLOW.

This is an action to recover damages for trespass upon land in which the title was put in issue and was the real question involved in the trial.

Plaintiffs claim title to the land in question under a deed from the State Board of Education to one Carrier, dated 3 July, 1896. The plaintiff offered evidence tending to show that the description in the above deed covered the three tracts of land described in the complaint and evidence to locate said land. Plaintiffs then offered in evidence mesne conveyances, connecting themselves with the aforesaid deed from the State Board of Education. It was shown that all of these deeds connecting plaintiff with said deed from the State Board of Education described the lands set out in the complaint, and that all grantees through whom plaintiffs held appear to be purchasers for value. The deed from the State Board of Education was, however, objected to on account of alleged defect in its probate, and for that it was asserted by defendants it could carry no title to the grantees in any view.

The defendant offered in evidence grant No. 732 to David Allison, dated 29 May, 1795, and it was admitted that this grant covered the land in question. Defendant then offered mesne conveyances connecting themselves with said David Allison grant, one of which was executed and registered in the year 1859, showing that the grantee therein was a purchaser for value. The defendant further introduced *evidence tending to show possession of such lands covered* by the Allison grant, and their mesne conveyances, from the year 1906 to the present time.

The plaintiffs thereupon offered in evidence a deed from Lemuel Doty, sheriff of Onslow County, to William R. Davie, Governor of North Carolina, dated 10 October, 1799. It purports to convey the lands set forth in the David Allison grant and lying in Onslow County to the State under a tax sale made by the sheriff of Onslow County. This deed was also objected to by the defendants, both on the ground of its competency and its effect.

The attestation clause, the form of execution, and the attempted probate of these deeds were as follows:

Deed of State Board of Education: In witness whereof the said State Board of Education has caused its corporate seal to be hereunto affixed and these presents to be subscribed by its president, secretary and treasurer, and this the date above written.

ELIAS CARR,
Governor and Ex Officio President State Board Education.

JOHN C. SCARBOROUGH,
Supt. Public Ex Officio Secretary of State Board Education.
(Seal of the State of North Carolina Board of Education.)

STATE OF NORTH CAROLINA—Pender County.

The foregoing signature of John C. Scarborough, Superintendent of Public Instruction and *ex officio* secretary State Board of Education, W. H. Worth, State Treasurer and *ex officio* treasurer of the State Board of Education, and Elias Carr, Governor and *ex officio* president of State Board of Education, with seal of the Board of Education, is adjudged to be correct. Let said deed and certificate be registered.

20 July, 1896. W. W. LARKIN, C. S. C.

NORTH CAROLINA—Onslow County.

The foregoing deed of conveyance from the State Board of Education of North Carolina to Cassins M. Carrier, of the county of Jefferson, State of Pennsylvania, with the official seal of the State Board of Education thereto attached, having been exhibited before me, it is adjudged to be in due form and according to law. Therefore let the same, with this certificate be registered. This 30 July, 1896.

CHAS. GEROCK,
Clerk Superior Court Onslow County.

Filed for registration 30 July, 1896; registered in due form, 7 October, 1896. C. C. MORTON, *Register.*

Deed of Sheriff: In witness whereof, I have hereunto set my hand and seal. Signed, sealed, and acknowledged in open court, October Term, 1799.

LEMUEL DOTY,
Sheriff. (Seal.)

Test: J. O. SCOTRAFF.

NORTH CAROLINA—Onslow County.

I hereby certify that the deed is recorded in Book A, page the one, agreeable to law. J. O. SCOTRAFF.

The foregoing is a true copy of the original on file in this office. Given under my hand, this 14 February, 1867.

R. W. BEST,
Sec. of State.

(State of N. C. Seal.)
Recorded with official seal.

D. CASWELL,
P. Secretary.

Deed—Gor 155-442 acres, Onslow County—Lemuel Doty to the Governor.

STATE OF NORTH CAROLINA—Onslow County.

Received for registration 13 August, 1867, and immediately enrolled in due form of law. Z. M. COSTON, *Reg.*

His Honor held that these deeds were incompetent and invalid to pass title, and plaintiffs excepted.

Judgment in favor of defendants, and plaintiffs appealed.

Winston & Matthews, J. O. Carr, E. M. Koonce and Cowper, Whitaker & Allen attorneys for plaintiffs.

Frank Thompson and L. R. Varser attorneys for defendants.

L. I. Moore for Roper Lumber Company.

ALLEN, J. The statute conferring title to certain lands on the president and directors of the Literary Fund, to which the State Board of Education is the successor, excepts from its operation swamp lands "heretofore entered and granted to individuals" (Rev. Stat., ch. 67, sec. 3), and it follows that when the defendants introduced a grant from the State to David Allison, issued in 1795, and mesne conveyances to the defendants, covering the land described in the complaint, they rebutted any presumption raised by statute in favor of the deed of the State Board of Education of date 3 July, 1896.

The effect of the introduction of the grant and the other conveyances was not only to show that the land had been granted to an individual before the statute in favor of the Literary Fund was enacted, and therefore the title did not pass by the terms and language of the statute, but also to establish title in the defendants, nothing else appearing, and the statute in favor of the deeds of the State Board of Education provides that the presumption shall last only "until the other party shall show that he hath a good and valid title to such lands in himself."

In this condition of the record, with nothing in evidence except the deed of the State Board of Education and mesne conveyances to the plaintiffs, and the Allison grant and mesne conveyances to the defendants, all covering the same land, the Court would unhesitatingly declare the title to be in the defendants, and it therefore became vital for the plaintiffs to establish the validity of the tax deed of Lemuel Doty, sheriff, to the Governor in 1799, for the purpose of showing that the title of Allison had been divested and did not pass to the defendants, and to again place the title in the State as vacant land subject to entry, which would belong to the Literary Fund under the statute, and then to the State Board of Education.

The sale for taxes was made under the act of 1798 (Rev. Stat., ch. 102, sec. 60 *et seq.*), of which *Chief Justice Ruffin* makes the following summary in *Avery v. Rose*, 15 N. C., 552: "It recites that the mode of selling lands for taxes as then established by law was insufficient to secure the collection of the revenue; and then provides, amongst other things, that, when no person will pay the taxes for a less quantity than the whole tract, it shall be deemed a purchase of the whole by the Governor, and the sheriff shall execute a conveyance to him and his successors for the use of the State; that it shall be the duty of the sheriff to perfect the deed by signing it, acknowledging and delivery thereof in the presence of the next county court; that the clerk shall register it in a book to be kept for that purpose, and after doing so shall certify the same and deliver it to the sheriff (who shall call on him for the same) within twenty days after the court; that the sheriff shall, before he settles his account with the Comptroller, deposit the deed with the Secretary of State, who shall record and keep it for the benefit of the State, and that the lands so conveyed shall be deemed vacant and subject again to entry. It then further provides that the Secretary of State shall give to the sheriff a certificate setting forth the quantity of land thus conveyed (the tax being then *ad numerum* not *ad valorem*), and that upon the deposit thereof with the Comptroller, and the oath of the sheriff that he had conveyed in conformity to the requisitions of the act, all the lands by him sold for taxes, and thus purchased for the use of the State, the Comptroller (the requisites of the act being complied with) shall allow the sheriff in his settlement a credit for the tax on those lands and all charges on the sale, and his commissions thereon, as if the sum had been collected in money; and lastly, that the sheriff shall be credited in like manner in his settlement at home for the county and poor taxes."

The learned Chief Justice then proceeds to discuss the statute in connection with the other revenue laws then existing, and reaches the conclusion that the State is not a purchaser as usually understood; that the purpose of the statute was not to enable the State to acquire title to land but to collect her revenue; that as the State was in no danger of losing the taxes, which were charged against the sheriff, for which he and his sureties were liable, that the provisions of the statute were for the benefit of the sheriff to provide the means for obtaining credit with the Comptroller and being discharged from liability for the taxes, and that the duty was enjoined upon the sheriff to follow the terms of the statute and to see that others did so, and it was held that the statute must receive a strict construction, and that a failure on the part of the sheriff to acknowledge the deed at the *next* ensuing term of the county court was fatal to the deed to the Governor.

We quote at length from the opinion because of its learning and reasoning, and it is the only authoritative construction of the statute in our Reports.

"But to us it seems that the State cannot be deemed a purchaser, whose title is to be protected, notwithstanding irregularities, within any of the principles on which they are disregarded in sales on executions. The scope of the act is not to enable the State to reacquire her territory from her own citizens. She does not wish it. As soon as she gets it under this act, it is by the same act offered for private appropriation again, upon the same terms on which it was before granted. The policy of the State, in this statute and throughout our legislation, is to part on the most favorable terms with all her public domain, with a few exceptions, and not to become again the proprietor of any that has been granted, unless in case of necessity. This is clear from the act of 1793, which forbids the surrender of land to avoid the taxes. It is apparent in the act of 1798 itself, for she does not purchase, as a chapman does, for the least price, but only takes the land instead of the tax, when the tax can be got in no other way, and if she does not take the title, the sheriff is responsible for that tax and the owner for the accruing ones. The great object of this provision, therefore, is not to acquire the land for the State, but to *secure* the *collection* of the taxes, to raise revenue, and have it duly accounted for and paid by the proper officers, and in justice to those officers, to make them account for and pay only such portions as they have collected or might have collected. . . .

"The act assures him (the sheriff) such credit, upon certain conditions which it puts in his power to perform, and the performance of which it requires to be established by certain evidence. The case then is not one in which the interest of the creditor or the debtor requires the law to be indulgent in overlooking omissions in the mode of proceeding. It is one in which the creditor is secure at all events, because she can look to the sheriff and his sureties for the tax, but in which she will not, provided he makes it appear in the manner prescribed, which is plain and easily attainable, that she ought not. This part of the act is therefore substantially and really for the benefit of the sheriff himself, the person charged with the duty of selling and with the performance of all the subsequent measures of importance required for its completion. Upon established principles he ought to be held to strict performance. He is so held in this statute. . . .

"The question has thus far been considered in reference to the words of this part of the statute and to the circumstance that the interest of the sheriff himself was principally concerned, and therefore that he should act in due time. Whatever interest the State has demands likewise his diligence throughout. It is important to her to know her actual net revenue, and what prior claims there are against her at the time it is paid in. She wishes to resell the land, that she has reluctantly taken back, and with as little delay as possible. An early and public notice of it in the county where it is situated is therefore deemed important. She wishes to avoid and detect frauds attempted on her, and therefore while the whole matter is of recent occurrence she requires that a sale made shall be acknowledged of record and in open court of that county, that no pretended sale may at a distant day be imposed on her and she brought in conflict with one of her own citizens. Every act of omission which tends to defeat these views is inconsistent with the real intention of the Legislature and cannot be tolerated. The State does not take the land but as a credit to the sheriff for the tax, and no conveyance to the State is to be taken as valid within the statute but such an one on the production of which the sheriff would be entitled to credit for tax. From this it would result that the sheriff must procure the other officers to do their duty, because otherwise the State is not bound to accept the deed, and the title does not vest in her, under this law, in any other case. . . .

"The authority to make the State a bidder is a special one and for the sheriff's benefit, to bid for her only where there is no other bidder for a tax due to her, and to make a deed if no other bidder, for a tax due to her, and to make a deed within a certain time upon which the sheriff shall have credit. It must therefore be strictly construed with respect to those acts and the periods prescribed. . . . Upon these grounds it is the opinion of the Court that the deed to the Governor is void, because it was not made or acknowledged at the court next succeeding the sale."

This authority was cited and approved in *Stewart v. Pergusson,* 133 N. C., 281.

Applying these principles, we must hold that the sheriff's deed is not valid and did not have the effect of passing title to the State, as it does not appear that it was acknowledged in open court at all, much less at the next succeeding term, or that it has been registered in the clerk's office as required by the statute.

The recital in the attestation clause of the deed that it was acknowledged in open court, appearing before the signature, not being made by an officer authorized to take the acknowledgment, amounts to nothing more than the unsworn declaration of the sheriff of what he intended to do and not of what he had done.

There is no evidence of any probate of the deed in any form, and consequently no room for the application of the doctrine of *Starke v. Etheridge,* 71 N. C., 240, and of other cases, holding that when the proper officer certifies that an instrument has been duly proven, without setting out his acts, it will be presumed that the probate was taken according to law, and no presumption can arise from registration, as it appears that the register acted upon the certified copy and the indorsements thereon sent to him in 1867, and not upon any other probate or evidence of acknowledgment.

Again, the tax deed bears date 16 October, 1799, and purports to have been made pursuant to a sale to collect the taxes of 1798, and of this phase of the case the Court says in the *Avery case:* "It (the statute) requires him (the sheriff) to produce and file the deed in the office of the Secretary of State before he settles for the taxes, and to make oath that he has conveyed all the lands struck off to the State, in conformity to the requirements of the act.

"The deed must therefore have been made, recorded and filed before the first day of October of the year in which the tax is payable (the succeeding year, in this case 1799). This of itself would be fatal to the plaintiffs' title."

This view of the case renders it unnecessary to consider the doctrine of ancient documents, or to pass on the objections to the deed of the

State Board of Education, but we would not be understood to approve the form of the execution of the deed or of its attempted probate.

Affirmed.

I. J. GUY v. BADGER BULLARD AND THOMAS E. OWEN.

(Filed 8 October, 1919.)

1. **Mortgages—Contracts—Leases—Sawmills—Payment—Title.**

   A contract in relation to a sawmill, called therein a lease, upon consideration that the bargainee shall cut or manufacture timber for the bargainor at the rate of one dollar per thousand feet, and when a specified sum has been accordingly paid it shall be treated as the purchase price of the mill, which shall then be the property of the bargainee, is to be considered in its effect as a mortgage, and upon his having complied therewith the title to the mill vests in him and the property becomes his as a purchaser.

2. **Same—Assignment—Waiver—Consent—Assignee's Rights.**

   A contract made for the purchase of a sawmill upon consideration of the purchaser's sawing or manufacturing a certain number of feet of lumber for the seller, which does not in express terms or by fair intendment import reliance on the skill, character or personal qualities of the purchaser for performance, is assignable by him, and upon compliance by his assignee with its terms such assignee becomes the purchaser; and where the original seller has knowingly accepted payments from him his conduct therein will amount to a consent or waiver, were the contract of a nonassignable character.

3. **Mortgages—Contracts—Stipulations—Right to Repossess—Waiver.**

   Where the mortgagee of a sawmill permits the mortgagor to continue to use the same, and afterwards the latter fully pays off the mortgage debt, he may not then avail himself of a provision in the instrument under which he may, at one time, have repossessed the mortgaged property.

APPEAL by plaintiff from *Guion, J.*, at May Term, 1919, of SAMPSON.

This is an action to recover a sawmill outfit.

On 28 April, 1917, the plaintiff entered into a contract with the defendant Bullard in reference to said property, which contract was afterwards assigned to the defendant Owen.

The contract recites "that whereas the said I. J. Guy is the owner of a certain sawmill outfit located in the county of Cumberland, on the Kelly Melvin land, which he is desirous of selling to the said Badger Bullard and which the said Badger Bullard is desirous of purchasing"; it then provides that "A. J. Guy has by these presents leased to the said Badger Bullard, subject to purchase." It further provides that "said

I. J. Guy agrees to lease to said Badger Bullard all of the above described property."

The terms of payment set out in the contract were $1 per thousand feet for each and every thousand feet of lumber cut and manufactured by said sawmill outfit, and the contract concluded with the following provision:

"It is further agreed by and between the parties hereto that the said Badger Bullard shall comply with the terms and conditions above enumerated, then and in that event when the sum of $750 has been paid the same shall be treated as the purchase price of said property, and he shall be the absolute and legal owner of the same, and the same shall be treated as a complete and full settlement by and between the parties hereto, and the property above described and enumerated shall all belong to the said Badger Bullard."

The judgment rendered in the Superior Court sets out the contract in full, and concludes as follows:

"And it further appearing to the court that on 12 February, 1918, the said Badger Bullard sold and conveyed and duly transferred in writing said contract for said mill, and all his right and title thereto under the aforesaid contract to the defendant, Thomas E. Owen; and it further appearing to the court that prior to the sale of said property by Badger Bullard to Thomas E. Owen the said Badger Bullard paid, under the contract the sum of $151.18, being the $1 per thousand feet mentioned in the contract on 151,179 feet of lumber sawed by him with said sawmill, and that after the sale and assignment of his contract the defendant has paid to the plaintiff, I. J. Guy, a sum which, together with the money paid by Badger Bullard, makes the total sum paid to I. J. Guy, the plaintiff, under the contract for said sawmill outfit, $750, of which $306.71 is evidenced by uncollected checks drawn by the defendant to the order of the plaintiff and now held by plaintiff uncollected, but which are collectible from funds in the bank on which they are drawn.

"Upon the foregoing facts found by his Honor and admitted by the parties, his Honor being of the opinion that said contract was a sale and not a lease, and that the purchaser of Badger Bullard, being the defendant, Thomas E. Owen, had a right to pay the said sum of $750 and take the property, and the defendants having paid said sum to the plaintiff herein:

"It is considered, ordered and adjudged that the plaintiff has been fully paid for his mill under said contract, and that plaintiff take nothing by his suit, and that the defendants recover of the plaintiff and John D. Kerr, Sr., surety on his prosecution bond, the costs of this action, to be taxed by the clerk of this court."

The plaintiff excepted and appealed.

Kerr & Herring and Fowler & Crumpler attorneys for plaintiff.
Butler & Herring attorneys for defendants.

ALLEN, J. A contract very much like the one before us was considered and construed in *Puffer v. Lucas*, 112 N. C., 377, and it was then held that contracts of this character are contracts of conditional sale, and that upon the payment of the purchase price the title to the property vests in the vendee.

This case has been affirmed several times, and notably in the case of *Hamilton v. Highlands,* 144 N. C., 280.

In this last case the plaintiff entered into a written contract with the defendant, which was called a lease, to hire to the use of the plaintiff for nineteen months a piano, etc., and to pay $50 cash and as rent $15 monthly, with further provision that if the defendant paid the installments of rent as they fell due he should have the right to purchase the piano for the total amount of the installments, in which case all sums paid as rent should be deducted from the purchase price, and the Court, after discussing the general effect of the contract, says: "It follows that the courts, in determining whether or not a contract is one of bailment or one of sale, with an attempt to retain a lien for the price, in effect a mortgage, do not consider what description the parties have given to it, but what is its essential character. It was a mere subterfuge to call this transaction a lease, and the application of that term to it in the written agreement of the parties does not in law change its real meaning. A contract like the one upon which this suit was brought has been held by a very large majority of the courts of this country to be, in substance, a conditional sale, although in the form of a lease (and so called) or of a bailment for use, with an option to purchase."

Numerous authorities are cited and discussed in support of the conclusion that the contract was one of conditional sale and that upon failure to pay the entire debt that the defendant was entitled to have the property sold and after applying enough of the proceeds to pay the balance of the debt to have any surplus paid to him.

The construction put upon the contract by the parties is entitled to consideration in determining its true meaning, but they cannot, by giving a name to it, change its legal effect.

These authorities are conclusive against the plaintiff's contention that the contract is one of lease and not of sale, nor can we sustain the position that the contract was not assignable.

The general rule is that any claim or demand can be transferred, and this contract does not come within any of the exceptions in *Petty v.*

Rosseau, 94 N. C., 363, nor does it in express terms or by fair intendment import reliance on the character, skill or personal qualities of the vendee for its performance, a class of contracts which cannot be assigned (*R. R. v. R. R.*, 147 N. C., 376), but if nonassignable it appears here from the findings in the judgment that the plaintiff has consented to the assignment by accepting a part of the purchase money from the assignee and by cashing one of the checks after the judgment was rendered and depositing it as security for the costs on the appeal.

It is found as a fact in the judgment that Bullard paid to the plaintiff $151.18 before the contract was assigned to Owen; that the plaintiff had, when the judgment was rendered, checks given to him by Owen amounting to $306.71, the two amounts aggregating $457.89, which deducted from $750, the full amount of the purchase money, which has been paid to the plaintiff, leaves $292.11 paid by the defendant Owen after the assignment of the contract and accepted by the plaintiff.

He is not therefore in a position to say that the contract has not been legally assigned to the defendant.

Nor can the plaintiff avail himself of the provision in the contract giving him the right to repossess the property upon failure to operate the mill for a period of thirty days because, instead of exercising this privilege, he permitted the defendant to continue in the use and operation of the mill and accepted the balance of the purchase money.

We find no error in the judgment.

Affirmed.

BEFARRAH v. SPELL.

(Filed 8 October, 1919.)

1. **Vendor and Purchaser—Liens—Exemptions—Homestead.**

   A vendor's lien for the purchase money "does not attach" either to personalty or realty in this State, and the purchaser may claim his exemption or homestead therein by proper proceedings in apt time.

2. **Same—"Final Process"—Constitutional Law—Statutes.**

   A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution, giving the creditor such right until execution or other final process. It is otherwise as to the demand for a homestead which must be allotted before levying upon the land. Con., Art. X, sec. 1; Rev., sec. 695.

3. Appeal and Error—Exemptions—Homestead—Findings.

Where for the first time, on appeal, the question is raised as to the residence of a claimant for his personal property exemption, and it appears that it is from a stock of goods in the county wherein he had been located and doing business, and his right had been erroneously denied on other grounds by the Superior Court, it will not be denied by the Supreme Court on the ground stated, in the absence of definite and specific finding as to residence.

APPEAL by defendant from *Guion, J.,* at February Term, 1919, of SAMPSON.

This is an action to collect certain notes given for the purchase price of a stock of goods. The facts are as follows:

On 28 March, 1917, N. J. Aboud, a merchant at Roseboro, N. C., sold to the defendant, T. F. Spell, his entire stock of merchandise for the sum of four thousand dollars, five hundred dollars of which was paid in cash and the balance represented by notes as set out in article two of the complaint, said notes being secured by a mortgage deed upon the dwelling-house and premises of the defendant, I. V. Spell, situate in the town of Roseboro. There was no mortgage or other lien given upon the stock of merchandise.

On the same date, to wit, 28 March, 1917, said notes and mortgage were duly transferred and assigned to the plaintiffs, J. E. Befarrah and F. Nassif, trading as the Raleigh Bargain House.

Default having been made in the payment of the second note, the plaintiffs sued out an attachment in the Superior Court of Sampson and seized said stock of goods. Upon motion of the defendant said warrant of attachment was vacated and set aside; and thereupon, at the request of the plaintiffs, a receiver was appointed to take charge of said stock of goods, wares and merchandise, sell the same, and hold the proceeds pending the final judgment in this action. Said goods were sold and the net proceeds from said sale were deposited with W. F. Sessoms, Clerk Superior Court.

This case was first tried by his Honor, Judge Calvert, at February Term, 1918, and the plaintiffs were nonsuited. An appeal was taken to the Supreme Court, and at the Fall Term thereof said judgment of nonsuit was set aside and a new trial ordered. See *Befarrah v. Spell*, 176 N. C., 193. In the meantime, upon the petition of J. E. Befarrah, a member of the firm constituting the Raleigh Bargain House, he was made a party plaintiff and allowed to file a complaint, which he did at August Term, 1918.

The certificate of the Supreme Court having been certified down, this cause again came on for hearing before Judge O. H. Guion, at February Term, 1919. The defendants, Spell and wife, requested his Honor to set apart to them their personal property exemption in the funds deposited with the clerk of the Superior Court. His Honor denied the request, and upon motion of the plaintiff Befarrah, and upon the complaint and answer, his Honor held that the claim of the plaintiffs constituted a purchase-money lien upon the stock of goods, wares and merchandise sold to the defendant, and that they were not entitled to any personal property exemption in said goods or the moneys derived from the sale thereof. Judgment was entered in accordance with the foregoing ruling, from which the defendants, Spell and wife, appealed to the Supreme Court.

Butler & Herring attorneys for plaintiff.
Grady & Graham attorneys for defendants.

ALLEN, J. A vendor's lien for the purchase money "does not attach to personalty" (39 Cyc., 1804), and in this State we have gone further and have refused to follow the English doctrine, giving such a lien in sales of land.

"Ever since the leading case of *Womble v. Battle,* 38 N. C., 182, decided in 1844, it has been settled in this State that a vendor of real estate who has conveyed it by deed has no lien upon the land for the purchase money, and that the English doctrine of the purchase-money lien does not obtain here." *Lumber Co. v. Lumber Co.,* 150 N. C., 288.

It follows that his Honor was in error in holding that the plaintiff was entitled to a lien upon the proceeds of the sale of the stock of goods to secure the purchase money notes, and there being no lien the defendant is entitled to his exemption unless he has waited too long, or his application cannot be made because no execution or process has issued to enforce payment of the plaintiff's judgment.

The statute (Rev., sec. 695), following the language of the Constitution (Art. X, sec. 1), gives to each resident of the State a personal property exemption of $500 out of his own property as against an execution or other final process, which is to be set apart on his demand, and, unlike the homestead exemption, which must be allotted before levying upon the land, the right to the exemption may be insisted on at any time before the sale or the appropriation of the property by the court—"at the last moment" (*Gardner v. McConnaughey,* 157 N. C., 482), and the order of the court directing the payment of the money is final process within the meaning of the Constitution.

The case of *Chemical Co. v. Sloan,* 136 N. C., 122, is decisive of both points. In that case the action was brought to recover money, the proceeds of the sale of certain fertilizers alleged to have been unlawfully converted by the defendant, a resident of this State, as agent of the plaintiff. The latter sued out an attachment upon the allegation in its affidavit that he had attempted to dispose of his property and was about to dispose of and secrete the same with the intent to defraud the plaintiff and his other creditors. The attachment was levied on personal property of the defendant, the value of which was less than $500. The property so attached being perishable, was sold by the sheriff under an order of the court, and the sheriff held in his hands the proceeds of the sale subject to the further order and direction of the court. The defendant claimed his exemption out of the money so held by the sheriff. The plaintiff resisted the claim upon the ground that the demand for the allotment of the exemption was not made until after the sale. The court ordered the allotment to be made by the sheriff. The defendant moved to vacate the attachment but the court denied the motion. There had been no judgment in the case and consequently no order directing the application of the money to the payment of the plaintiff's claim. The Court said, in discussing the question presented: "We do not see why the defendant is not entitled to his exemption upon the foregoing facts. The Constitution exempts the personal property of any resident of this State to the value of $500 from sale under execution or other final process. This language is too plain and explicit for any possible misunderstanding of its meaning. It is only when the property is about to be subject to the payment of a debt by final process that the last opportunity is left to the defendant to claim his exemption. At any time before this stage of the proceeding is reached he may make his demand and become entitled to an allotment of the exemption. This is perfectly clear without light upon the subject from any of the authorities. A warrant of attachment is mesne process and is nothing more than a provisional remedy. It is ancillary to the relief sought in the principal action and is intended to preserve the property, or its proceeds if it has been sold as perishable, in the hands of the sheriff or in the custody of the law to abide the event of the suit. The defendant may demand his exemption when the warrant is levied on his property and it is taken out of his possession, or he may wait until the final process is issued and the property is about to be appropriated by sale to the satisfaction of the same."

The facts in the *Sloan case* were more favorable to the plaintiff than in this because in the *Sloan case* the motion to dissolve the attachment was denied, while in this it was allowed.

The plaintiff also objects to the allotment of the exemption because it does not appear that the defendant is a resident of this State, but as this objection was not made in the Superior Court and the ruling of his Honor was on a different ground, and the defendant was engaged in business in Sampson County, we would not be justified in denying the right to the exemption because of lack of more definite and specific finding as to residence.

Upon the record as it now stands the male defendant is entitled to his exemption.

Reversed.

W. A. & C. MITCHELL, PARTNERS, v. SOUTHERN EXPRESS COMPANY ET ALS.

(Filed 8 October, 1919.)

Judgments — Default and Inquiry — Cause of Action — Evidence—Express Companies—Carriers of Goods—Bills of Lading—Contracts.

A judgment by default and inquiry establishes the plaintiff's right to recover damages, and his cause of action upon the subsequent trial, and where the defendant is an express company, a provision in its bill of lading or contract of carriage, offered in evidence for the purpose of defeating plaintiff's cause of action, is properly rejected by the court.

APPEAL by defendant from *Guion, J.*, at June Term, 1919, of LENOIR.

This action was instituted by the plaintiffs against the Southern Express Company on 13 March, 1914, to recover damages to a carload of horses and mules alleged to have been delivered to Adams Express Company at Cincinnati, Ohio, on 3 October, 1912, and by the Adams Express Company delivered, in the city of Richmond, Va., to the Southern Express Company for transportation to Kinston, N. C., and by the Southern Express Company delivered to the plaintiffs at Kinston on 5 October, 1912, the damages claimed being for alleged injury to a mule and two horses, due, among other causes as alleged, to the improper arrangement of timbers in said car. Summons was not originally issued against the Adams Express Company, but at the June Term, 1915, an order was made adjudging that the Adams Express Company be made a party defendant to the action, and that summons issue against the said express company. Service was not obtained, and at the April Term, 1916, another order was rendered by the court, adjudging that the said express company be made a party defendant to the action and that summons issue against it, and on 15 May, 1916, which was before the convening of any court subsequent to the said April Term, 1916, summons was issued against the Adams Express Company and duly served on 19 May, 1916, returnable to the June Term, 1916, which convened on 12 June. A duly verified complaint was filed against both of the defendants on 26 January, 1916, which was before service was made upon the Adams Express Company, but was after an order adjudging that it be made a party had been rendered.

The plaintiffs seek to recover against both of the defendants the sum of $372.50 for causes as appear in the complaint. At the April Term, 1918, a judgment by default and inquiry was rendered against the Adams Express Company, which company had then filed no pleading and had made no appearance in court of any nature. During the April Term, 1918, of said court, and after the rendition of the judgment entitled "Judgment by Default and Inquiry," the defendant, Adams Express Company, for the first time made an appearance in court and moved the court to strike out said judgment for surprise and excusable neglect, alleging that it had, soon after being summoned, instructed its district counsel to retain counsel, and that the defendant, Adams Express Company, was not aware that appearance had not been entered for it and that a defense had not been asserted until after the rendition of said judgment by default and inquiry. The motion to strike out the judgment was continued and was refused and disallowed by his Honor, Judge Guion, at the June Term, 1919, and the action directed to proceed to trial upon the inquiry as to the amount of damages sustained by the plaintiffs.

The answer of the Southern Express Company was filed, as appears of record, on 8 April, 1918, and the plaintiffs filed replication as set out in the record on 8 April, 1918.

At the June Term, 1919, when the cause came on for trial upon the whole cause of action as alleged against the Southern Express Company and upon the judgment by default and inquiry as to the Adams Express Company, the court held, upon the pleadings as to the Southern Express Company and upon the admission of the plaintiffs in open court, that the action had not been instituted within six months from the time of the injury complained of; that the plaintiffs could not recover for any amount against the defendant, Southern Express Company.

The cause then proceeded to trial against the defendant, Adams Express Company, upon the judgment by default and inquiry.

The express company offered the bill of lading in evidence for all purposes, and the court admitted it on the issue of damages, but held that the defendant, Adams Express Company, could not have the benefit of the provision requiring the action to be brought within six months, because of the judgment by default and inquiry, and defendant excepted. Judgment in favor of plaintiff, and defendant appealed.

Dawson, Manning & Wallace attorneys for plaintiffs.
Rouse & Rouse, attorneys for defendant, Adams Express Company.

ALLEN, J. There is no exception to the refusal to set aside the judgment by default and inquiry, nor is the legal effect of the provision, requiring the action to be brought within six months, before us, as the bill of lading was only admitted in evidence on the issue of damages.

The sole question presented is whether the judgment by default and inquiry prevents the defendant from relying upon the provision in the contract.

The effect of a judgment by default and inquiry is to establish the cause of action alleged in the complaint, and if the recovery sought is damages, to give to the plaintiff the right to recover at least nominal damages, and no evidence is admissible tending to prove that no right of action exists.

In *Hollifield v. Telephone Co.*, 172 N. C., 714, where there were two parties defendant, one of whom answered and the other of whom failed to answer, judgment by default and inquiry was rendered against the defendant who failed to answer. In discussing the question involved, the Court says: "He failed to plead and judgment by default was entered against him, which established as against him, under our procedure and procedure generally, the cause of action alleged in the complaint. *Blow v. Joyner,* 156 N. C., 140; *Graves v. Cameron,* 161 N. C., 549; *Patrick v. Dunn,* 162 N. C., 19; *Plumbing Co. v. Hotel Co.,* 168 N. C., 577. It was not necessary to submit an issue as to this negligence, when he admitted it by failing to answer. *Justice Brown* well says in *Plumbing Co. v. Hotel Co., supra:* 'The default is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action. 23 Cyc., 752. It admits all the material averments properly set forth in the complaint, and, of course, everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action is irrelevant and inadmissible,' citing *Gerrard v. Dollar,* 49 N. C., 176; *Lee v. Knapp,* 90 N. C., 171; *Blow v. Joyner, supra; Graves v. Cameron, supra.* This being so, the only thing left to do in regard to the resident defendant was the assessment of damages, after ascertaining the negligence of the other defendant."

This authority covers fully the exception presented, and sustains the ruling that the provision of the bill of lading was inadmissible to destroy the plaintiff's action.

No error.

J. B. DEBNAM v. J. A. WATKINS AND WIFE.

(Filed 8 October, 1919.)

1. Mortgages—Tender—Payment Into Court.

An unaccepted tender by the mortgagor of the amount due the mortgagee on the mortgage debt is insufficient, though properly made, unless the tenderer shows his ability, readiness and willingness to pay the money when tendered and brings it into court when he sues to redeem.

2. Mortgages—Sales—Mortgagor a Bidder—Tender—Waiver—Estoppel.

A mortgagor of lands, who attends the sale made under the power contained in the mortgage, and, remaining silent, becomes a competitive bidder, though he has a right to buy in the property in protection of his title, is estopped *in pais* as against the purchaser to set up an unaccepted tender theretofore made to the mortgagee after the maturity of the note secured by the instrument; and his silence with knowledge of his right. under such circumstances, will be construed as a waiver of the right claimed, if any he may have had.

ACTION tried before *Allen, J.*, and a jury, at January Term, 1919, of WAKE.

William Mitchell died in the year 1890 and left a will, in which he devised the tract of land in question to C. R. Debnam for life, remainder to his five children, Joseph B., Mattie, Bettie, Hattie and Thomas Debnam. C. R. Debnam, the life-tenant, is still living, and about thirty years ago he leased the land to the defendant, J. A. Watkins, who has held it from year to year, under the lease, ever since. On 28 October, 1909, C. R. Debnam and Hattie Debnam, one of his children, conveyed all their interest in the land, by deed of trust, to W. N. Jones, to secure an indebtedness of $80, which deed was duly recorded in October, 1909. On 16 December, 1910, C. R. Debnam and Thomas Debnam, one of his children, conveyed all their interest in the land, by mortgage, to B. F. Montague, to secure an indebtedness of $122.33, which mortgage was duly recorded on 26 January, 1911. Thomas Debnam and C. R. Debnam having failed to pay the indebtedness secured in the mortgage to B. F. Montague, the latter, under the power of sale in said mortgage, sold the land, and the defendant J. A. Watkins purchased the same at the sale on 13 April, 1912, for $225, and a deed was duly made to him by B. F. Montague and registered in April, 1912. Hattie Debnam and C. R. Debnam having failed to pay the indebtedness secured in the deed of trust to W. N. Jones, the latter sold the land, under the power of sale in the deed of trust, and conveyed the same to plaintiff, J. B. Debnam, for $260 by deed recorded on 13 July, 1913. The defendant having failed to pay rent or to give possession to the plaintiff, he commenced this action for possession and damages, as shown in his complaint.

The jury returned the following verdict:

1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint? Answer: "Yes."

2. What is the yearly rental value of said land? Answer: "$100."

Judgment on the verdict, and defendant appealed.

Jones & Bailey for plaintiff.
J. G. Mills for defendants.

WALKER, J., after stating the facts as above: The questions of fraud and improvements may be eliminated from the case as the first is not properly pleaded, nor is the second referred to at all. It was agreed that the issues be settled after hearing the evidence. There was no evidence of fraud. It may be, as suggested by plaintiff on the argument, that defendants may proceed under the statute to have an allowance made for improvements, but we give no opinion as to this matter it not being before us.

Under the tender alleged to have been made to Mr. Jones, the senior mortgagee, the money has not been deposited in court, although the defendants seek in this action to redeem from the Jones deed of trust. It was said by *Justice Allen* in *Lee v. Manley,* 154 N. C., 244: "In *Dixon v. Clark,* 57 E. C. L., 376, *Wilde, C. J.,* announces the rule as follows: 'The principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money, the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered'; and this is cited with approval in *Bank v. Davidson,* 70 N. C., 122. In *Bilzell v. Haywood,* 96 U. S., 580, it is said that 'To have the effect of stopping interest or costs, a tender must be kept good;' and in *Soper v. Jones,* 56 Md., 503: 'A plea of tender, not accompanied by *profert in curiam,* is bad.' In *Parker v. Beasley,* 116 N. C., 1, it is held that an unaccepted tender of the amount due on a debt secured by a mortgage does not discharge the lien of the mortgage unless the tender be kept good and the money be paid into court, and the same doctrine is affirmed in *Dickerson v. Simmons,* 141 N. C., 330." The alleged tender of defendants was made after the note was due. It is not necessary that our conclusion be based upon this ground alone, and that case is specially mentioned as appearing to be analogous in its facts, and it seems to be sufficiently so to control our decision.

There is another reason for affirming the judgment. If the tender of the amount due on the note secured by the deed of trust to Mr. Jones was properly made, or was a good tender, it appears that thereafter Mr. Jones, as trustee, offered the land for sale, after advertisement; that defendants attended the sale and bid for the land, without giving any notice to the other bidders that the sale was unauthorized because of a previous tender by him of the amount due upon the note secured by the deed of trust. He made no such claim at that time, and the plaintiff purchased at the sale, for full value and without any notice of any such claim on the part of the defendant. This, plaintiff contends, was a waiver of the tender defendants made, so far as he is concerned, and an estoppel upon the defendants to set it up as a defense in this action, even if, under other circumstances, it would be a valid one. This subject was considered to some extent in *Dickerson v. Simmons,* 141 N. C., 325, at 329, where it is said: "It is well settled and universally held that an unconditional tender on the day when the mortgage debt falls due, called the law day, discharges the lien of the mortgage, although the debt survives as a personal liability. 20 Am. & Eng. Enc. (2d Ed.), 1062, and cases cited; *Shields v. Lazear,* 34 N. J. Law, 496. As to the effect of a tender made, as in this case, after maturity, there is much conflict of authority. In those jurisdictions where the mortgage is treated simply as a security to a debt, the rule is that a mortgage is discharged by a proper tender made at any time before foreclosure, and that a sale under the power is void. In those more numerous jurisdictions where the common-law doctrines prevail, the lien of the mortgage is not discharged by the tender, the only effect being to arrest the accruing of interest and to free the debtor from future costs. If the mortgagor desires by his tender to discharge the lien, when it is not accepted, he must bring his suit for redemption and pay the money into court. North Carolina, Massachusetts, New Jersey, and other States are classified as jurisdictions which adhere to the common law. 20 Am. & Eng. Enc. (2d Ed.), 1063. In the first-named jurisdictions it is held that, where tender is made after the law day, a sale under the power is void even as to a *bona fide* purchaser for value. *Cameron v. Irwin,* 5 Hill (N. Y.), 272-6; Pingree on Mortgages, sec. 1342. The contrary is held in Massachusetts and some other courts, which adhere to the common law. Jones on Mortgages, 1798, and cases cited. Those courts regard the power as one coupled with an interest which cannot be revoked, and hold that a sale under the power, after an unaccepted tender, transfers the legal title to the purchaser, and that the tender is merely a foundation for a suit in equity for redemption. It seems, therefore, that in those States a *bona fide* purchaser for value and without notice of tender gets a good title. It is also held that a mortgagor who has notice of an intended sale and allows it to proceed without objection cannot afterwards show a tender or even a payment in full of the mortgage debt and thereby defeat the title of a *bona fide* purchaser for value without notice. *Cranston v. Crane,* 97 Mass., 459; Jones on Mortgages, sec. 1788. It has been determined expressly by this Court that 'the unaccepted tender of the amount due on a debt secured by mortgage does not discharge the lien of the mortgage unless the tender be kept good and the money paid into court. Its only effect is to stop interest and cost accruing after tender,'" citing *Parker v. Beasley,* 116 N. C., 1. But our case is stronger for this plaintiff. The defendants knew of the sale and attended it with a view of becoming a purchaser, and was a competitor of the plaintiff in the bidding. He said nothing about his tender, did not rely upon it, and offered no objection to the sale. If he had any objection to it, based on the tender, common fairness required of him to then and there make it known and not to impress the plaintiff with the belief that no such objection existed, and thereby induce him to buy the land after being lulled into security by the defendants' silence and inaction, or by his conduct at the sale. In this connection, it is further said in *Dickerson v. Simmons,* at p. 330: "Notwithstanding the conflict between the courts as to the effect of a tender made after the law day, it seems to be agreed by all that a mortgagor may preserve his right to redeem against any purchaser by giving him notice of the tender before or at the sale," citing *Cranston v. Crane, supra;* Jones on Mortgages, *supra.* This the defendants did not do, but the opposite, as they not only assented to the sale but actually participated in the bidding. It would be very inequitable that they now should be allowed to set up their alleged tender, after they had held out to the plaintiff by their conduct that there was no such objection, or if it ever existed, that they waived it. Having been silent when they should have spoken, we will not hear them speak when they should be silent. They had undoubtedly a right to buy at the sale to protect their own title, but the obligation rested upon them not to put another to a disadvantage by their conduct, and cause him to do what otherwise he would not have done if the defendants' claim had been disclosed. Even in the assertion or protection of his own rights, a party should not by his acts or conduct mislead others, who will be prejudiced thereby, because of their ignorance of facts which were known to him and also because of his conduct, which induced them to act. The doctrine is well stated by the learned Reporter in the fourth headnote to *Mason v. Williams,* 66 N. C., 564: "Not only the *uberrima fides,* but that simple *bona fides* which the law exacts from every man, required the true owner to make known his claim at said sale or never; he should have given all bidders the advantage he possessed from his exclusive knowledge, and his omission to do so amounted to a negligence which imperiled the interests of others, and gave him an unfair advantage over them, enabling him, if he could, to buy low, and thereby secure an indisputable title, or if another outbid him, to fall back on his reserved claim." There Mr. Mason attended the sale to protect his interest in the property, but he assented to the sale without making known his claim or his object in bidding, and he bid for the property, and by his silence induced another to buy. He was held to be estopped afterwards to assert his title against the purchaser. That case has been approved many times by this Court.

In *Morris v. Herndon,* 113 N. C., 236, at p. 239, *Shepherd, C. J.,* thus refers to the case: "The rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things existed, and acts on that inference, he shall be afterwards estopped from denying it," citing *Mason v. Williams, supra.* The passage was quoted from the opinion of *Bramwell, J.,* in *Cornish v. Abingdon,* 4 Hurl. & Nor. (Exch. Rep.), 549. He also quotes from 2 Herman on Estoppel, 9627, as follows: "But this is applicable only in the case where the foundation of the estoppel is in silence or acquiescence, for when the owner concurs in a sale by participating in it at the time, it becomes his own act." And in *Biggs v. Brickell,* 68 N. C., 239, *Justice Boyden* refers to the case in these words: "Can any one maintain that the debtor who assented to this sale could have successfully defended an action of ejectment brought against him by the defendant? We think *Lentz v. Chambers,* 27 N. C., 587, and *Mason v. Williams,* 66 N. C., 564, and the cases therein cited, are decisive of the question." See *Hardware Co. v. Lewis,* 173 N. C., 293. In this case it appears from the defendants' own testimony that they attended the sale, assented to it, and the male defendant was one of the bidders, that they gave no notice of their tender to the plaintiff or any other bidder. There seems to be no controversy about the facts, and the case falls within the principles of tender, payment of money into court, and estoppel, which we have stated as being settled by the authorities cited.

We have assumed in the discussion that the tender itself, as alleged by the defendants, was sufficiently made, that is, was in due form, though there is reason to doubt it.

No error.

MRS. JENNIE S. POWELL ET AL. v. SEABOARD AIR LINE RAILWAY COMPANY, NORFOLK SOUTHERN RAILROAD COMPANY, AND THE CITY OF RALEIGH.

(Filed 15 October, 1919.)

1. **Municipal Corporations—Cities and Towns—Railroads—Bridges.**

Under its police powers and the statutes applicable, a city government has the right to require railroad companies to construct bridges for streets running over their tracks.

2. **Railroads — Damages — Municipal Corporations — Cities and Towns—Bridges—Abutting Owners—Constitutional Law.**

Where a railroad company is required by a city to substitute a concrete bridge for one that has become rotten and unsafe, across its excavations, in connection with one of its streets, without specification as to its elevation, and accordingly the company has constructed the bridge and its approaches so as to damage the lands of an abutting owner, causing the level of the lot to be below that of the street, etc., by raising the elevation of the bridge to make a higher clearance between it and the tracks for its own benefit, or convenience for the passing of its trains, the company is liable for the damages thus caused though it had acted under plans submitted to the municipal board and approved by it, under the principle that it may not take, under its charter, the lands of private persons or damage them, without just compensation. *Semble,* the company would also be liable if the city had specified the height of the bridge as built.

3. **Appeal and Error—Evidence—Instructions—Issues—Prejudicial Error—Harmless Error—Statutes.**

The result of the trial of a cause will not be disturbed unless it is reasonably made to appear that prejudicial error has been committed to the injury of the appellant, and where objection is made that the charge of the court did not fully or sufficiently state and apply the law to the evidence as required by Rev., sec. 535, and the issue was one largely of fact with the pertinent testimony very restricted in its nature, and the charge as a whole was correct, with the burden of proof properly placed, a new trial, in the absence of prejudice to the appellant, or where the jury could not have been misled, will not be awarded.

4. **Evidence—Damages—Railroads—Bridges—Abutting Owner—Subsequent Conditions—Expert Evidence—Opinions.**

Where the defendant railroad company is liable for damages to the land of an abutting owner of lands in erecting a bridge on a city street over its tracks, such damages is the difference in the value of the property caused by the elevation of the grade, and more properly at the time of the completion of the structure, but testimony of those qualified by extended experience, and in regard to conditions of this permanent character, and in the absence of testimony showing appreciable change of conditions, is competent when their testimony is based upon their observation some two years afterwards.

5. Evidence—Damages—Railroads—Bridges—Abutting Owner.

Where, in the building of a bridge across a street over its track, a railroad company has damaged the lot of an abutting owner by elevating the street in front thereof, plaintiff's testimony is competent evidence, and certainly not to the defendant's prejudice, as to the cost of filling in and restoring the lot, and elevating the building thereon, when the court has confined the jury, in their ascertainment of the damages to be awarded, to an amount within that of the depreciation of the market value.

6. Evidence — Damages—Railroads—Bridges—Assessed Valuation—Appeal and Error—Harmless Error.

The valuation of the board of assessors for taxation is not evidence of the value thereof in the owner's action to recover of a railroad company damages thereto in building a bridge on its adjoining right of way: nor is it competent for the defendant to show that the plaintiff's predecessor in title appeared before the board to resist such valuation as being excessive.

7. Instructions — Damages—Railroads—Common Benefits—Separate Benefits—Evidence.

In this case it is held that the judge properly charged the jury on the question of excluding damage or benefit common to the community at large in the building of a bridge by the defendant railroad company, and, under the evidence, as to excluding the damage by reason of benefits or advantages peculiar to the property.

CLARK, C. J., did not sit.

ACTION tried before *Allen, J.,* and a jury, at Special Term, 1919, of WAKE.

The action is to recover damages alleged to have been caused to the lands of plaintiff, a house and lot, in Raleigh, N. C., by the construction of a concrete bridge on Hillsboro Street, in said city, over the tracks of the railroad companies, raising the approaches to said bridge, to the injury of plaintiff's lot abutting on the street.

During the progress of the cause a nonsuit was entered as to the Norfolk Southern Railroad Company and the City of Raleigh, and the issues were determined as between plaintiffs, owners of the lot, and the Seaboard Air Line Railway Company, liability being resisted chiefly on the ground that the bridge in question had been constructed by the railroad pursuant to an ordinance and requirement of the Raleigh city government.

On issues submitted, the jury rendered the following verdict:

1. Are the parties whose names are set forth in the amended complaint the owners of the property alleged to have been damaged? Answer: "Yes."

2. Are T. C. Powell and R. H. Merritt the duly appointed and qualified executors of the will of Jennie S. Powell, as alleged in the complaint? A. "Yes."

3. Are the parties named in the amended complaint the devisees in the will of Jennie S. Powell, as alleged? A. "Yes."

4. Was the defendant Seaboard Air Line Railway Company required by the City of Raleigh to construct a bridge over its tracks on Hillsboro Street? A. "Yes."

5. Did the defendant Seaboard Air Line Railway Company construct the bridge according to plans approved by the board of aldermen of the City of Raleigh? A. "Yes."

6. Did the Seaboard Air Line Railway Company, in constructing the bridge over its tracks on Hillsboro Street, of its own accord, increase or cause to be increased the grade of said street abutting upon the land described in the complaint? A. "Yes."

7. Did the defendant Seaboard Air Line Railway Company, in building said bridge, increase or cause to be increased the grade of said street for the benefit of said Seaboard Air Line Railway Company? A. "Yes."

8. Was the land (house and lot) described in the complaint damaged by reason of the building of said bridge and the alleged increase in the grade of the street in front of said land, as alleged in the complaint? A. "Yes."

9. If so, what damages did plaintiffs sustain as a consequence thereof? A. "Three thousand dollars ($3,000)."

Judgment on the verdict for plaintiff and defendant appealed, assigning errors.

Jones & Bailey for plaintiffs.
Murray Allen for defendant S. A. L. Railway Company.

HOKE, J. The right of the city government, both under its police powers and the several statutes applicable to require railroads to construct bridges along streets running over their tracks, is fully established in this jurisdiction and is recognized in well-considered cases elsewhere. *R. R. v. Goldsboro,* 155 N. C., 356; *S. v. City of Minneapolis,* 98 Mich., 380; *Cleveland v. City of Augusta,* 102 Ga., 233; *R. R. v. Nunn,* 208 U. S., 583; 3 Elliott on Railroads (2d Ed.), sec. 1092; Rev., secs. 2569-2700, etc. And there is high authority for the position that when such a bridge has been constructed pursuant to the city's requirement, and the bridge itself or the necessary and proper approaches thereto "invade the proprietary rights of an abutting owner, causing material injury to the same, recovery may be had by such owner against the company," this for the reason, among others, that the railroad acquires and holds its right to pass under public streets subject to all reasonable orders of this kind. And when they are obeyed and the structure is completed or while it is being built the undertaking is considered as being in the exercise of its chartered rights and duties, and so becomes the act of the company for which it may be properly held accountable. *Burritt v. R. R.*, 42 Conn., 174; *English, Treas. v. R. R.*, 32 Conn., 240; *Baltimore and Ohio R. R. v. Kane and Wife*, 124 Md., 231.

In this connection it may be well to note that under the law prevailing in this State an invasion of this kind, when wrongfully made, constitutes a taking within the meaning and application of the principles of eminent domain and cannot be lawfully insisted upon except on compensation duly made to the owner. *Caveness v. R. R.*, 172 N. C., 305.

While we are disposed to approve the position above stated, it is not necessary for appellees to rely upon it in order to sustain the recovery had by them in this instance, as the jury under a charge free from reversible error have determined that the raising of the grade of the Hillsboro bridge was done by the company of its own motion and for its own benefit. See verdict on sixth and seventh issues. A perusal of the record will show that because the old wooden bridge had become "rotten and unsafe" the city ordinance required the company to substitute a steel or concrete bridge without specifications as to any elevation of grade, and that while the plans were approved by the city, the elevation which worked the injury complained of was done, as stated, for its own benefit, there being facts in evidence permitting such inference, and that it was done for the reason that the company thereby procured a greater clearance from the top of the tracks to the bottom floor of the bridge, and rendering the operation of their trains less liable to accidents and injuries; the evidence on part of plaintiff being that the additional clearance amounted to as much as 2 feet and 7 inches. And where this is true, that is, where the road has constructed the bridge so as to cause injury to an abutting owner of its own motion or for its own benefit, all of the authorities so far as examined concur in the ruling that the company may be held liable, notwithstanding it has acted under plans submitted to the municipal board and approved by them. *Bennett v. R. R.*, 170 N. C., 389; *Brown v. Electric Co.*, 138 N. C., 534; *White v. R. R.*, 113 N. C., 610; *Midland Co. v. Williams*, 92 Ala., 277; *Thrader v. Cleveland and City Ry.*, 242 Ill., 227; reported also with an instructive note in 26 L. R. A. (N. S.), 226. In this last publication the general principle referred to is stated in the first headnote, as follows:

"1. A railroad company is, under a constitutional provision requiring payment of damages for property injured for public use, liable for injury to property abutting on the street, by the construction of a viaduct, under authority of the municipality to carry a street over its tracks which intersect it, if the work is done for its benefit, to enable it to lay its tracks through the municipality."

While it is fully recognized here and elsewhere that a municipal corporation may alter and change the grade of an established highway in their discretion, and ordinarily without making further compensation to abutting owners (*Wood v. Land Co.,* 165 N. C., 367, and authorities cited), this right and immunity only exists for the public benefit and may not be used or sanctioned by contract or ordinance of the municipality in favor of a private or public service corporation controlled by private owners and creating additional burdens to the injury of abutting owners, except on compensation duly made.

Thus it was held, in the well-considered case of *Bennett v. R. R.,* "That the right conferred upon a municipality to grade its streets without liability to abutting owners, within the proper exercise of discretionary power, is for the public benefit and cannot be transferred to a railroad company to do so for the furtherance of its own business." And in *Brown v. Electric Co., supra,* it was held that:

"1. The right acquired by a city by condemnation of a street and sidewalk is confined to the public necessity and to the uses for which property is taken or burdened with the easement, and for any additional burden placed upon the servient tenement compensation must be made.

"2. The power of the city to confer upon the defendants a franchise to lay their tracks, erect their poles, and string their wires along the streets or sidewalks cannot affect the right of abutting owners to demand compensation for any additional burden placed upon their property."

The verdict, therefore, having established, as stated, that this elevation of the bridge, rendering necessary an elevation in the approaching street, was done by defendant company of its own motion and for its own advantage, it is liable for the damages thereby caused to abutting owners, notwithstanding the plans for the bridge were approved by the governing authorities of the city, and the defendant's motion for nonsuit has therefore been properly disallowed.

It was objected to the charge on the seventh issue that the same does not state and apply the law to the evidence with sufficient fullness and was no proper compliance with sec. 535 of the Revisal, appertaining to the instructions of the trial court to juries, but considering his Honor's charge on this issue as an entirety, we do not think it is justly open to the objection. The issue referred to was very largely one of fact with the pertinent testimony very restricted in its nature, and the court, after stating the position of the parties concerning the issue and the evidence, putting the burden on the plaintiff, left it to them to determine the question involved. No jury could have been misled or failed to apprehend fully the significance of the issue and the evidence relevant to its proper determination, and assuredly there is no case presented for reversible error. This cause, requiring much time and work, has been fully and carefully tried with the assistance of competent, alert and diligent counsel on both sides. The determinative issues have been fairly decided, and the results of the hearing should not be disturbed unless it is reasonably made to appear that the appellant's defense has been in some way prejudiced by substantial error.

In a well-considered case at the last term, *Brewer v. Ring,* 177 N. C., 476, opinion by *Associate Justice Walker,* it was said: "Courts do not lightly grant reversals, or set aside verdicts, upon grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be at least something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. Hilliard on New Trials (2d Ed.), secs. 1 to 7."

Appellant also insisted on several exceptions to the rulings of the court as to the reception of evidence on the issue as to damages.

1. That D. F. Fort, V. O. Parker and perhaps one or two others, were allowed to give their opinion as to the difference in the value of the property caused by changes of grade in the approach to the bridge, their opinion being predicated on examination of the property and conditions attending the change three years before the trial, i. e., 1916, when the time of the estimate should have been when the bridge was completed, to wit, in 1914. Undoubtedly the time when this estimate of damages should be made is the difference in value of the property caused by the elevation of grade and more properly at the time when the structure was completed, and the court so instructed the jury. But conceding that the bridge was completed in 1914, as defendant contends, though this does not very satisfactorily appear, under permanent physical conditions of the kind presented here and in the absence of any definite testimony showing, meantime, a substantial change in values, we think that the opinion of these witnesses, qualified by extended experience and from personal examination of the property in 1916, is relevant on the question of value and was properly admitted. *Myers v. Charlotte,* 146 N. C., 246; *Creighton v. Water Co.,* 143 N. C., 171; *Blevin v. Cotton Mills,* 150 N. C., 493.

2. That evidence was received over defendant's objection as to how much it would cost to restore the lot by jacking up the house and hauling in earth to restore the same to its former relative grade. This was admitted by his Honor as a relevant circumstance on the question of injury to market value and in so far as it tended to provide a reasonable method of relief. His Honor, however, was careful to tell the jury that this was not the measure of damages, and should in no event be

considered or allowed for, so as to enhance the damages and make them greater than the depreciation of market value. So restricted, the testimony was properly allowed. 10 R. C. L., pp. 175-176, title, Eminent Domain, sec. 152. As a matter of fact, both the evidence and the ruling thereon had a natural tendency to moderate the damages and could not have worked harm to defendant's position on the issue.

3. That the court excluded the circumstance that where the official board of valuation had assessed property at a higher rating after the alleged injury, the then owner, ancestor in title of the present plaintiff, appeared before them and endeavored to have same reduced.

So far as the action of the board of assessors was concerned it has been generally ruled irrelevant on the question of valuation. *Hamilton v. R. R.,* 150 N. C., 193. And as to the action of plaintiff's predecessor in title, his action as indicated tended to favor his own position on the issue, and its exclusion could in no sense be held to have prejudiced defendant's case.

His Honor's instructions as to the exclusion of damages and benefits common to the community at large is in general accord with our decisions on the subject, and we concur in his view that there are no facts in evidence which called for or permitted a reduction by reason of benefits or advantages peculiar to the property. *Phifer v. Comrs.,* 157 N. C., 150; *Bost v. Cabarrus County,* 152 N. C., 531.

On careful consideration of the record and the many exceptions, we are of opinion that no reversible error has been shown, and the judgment of the Superior Court must be affirmed.

No error.

H. K. RUARK ET AL. v. J. W. HARPER ET AL.

(Filed 15 October, 1919.)

1. Tenants in Common—Husband and Wife.

The relationship of husband does not make the man a tenant in common of lands by reason of the fact that his wife is such tenant.

2. Same—Deeds and Conveyances.

The husband may not acquire under a tax deed the interest of his wife as a tenant in common with others in lands, though he may acquire thereby the title of the others; and a deed made by the husband and wife of the lands he has thus acquired will convey the whole title to the purchaser. *Smith v. Smith,* 150 N. C., 81, cited and distinguished.

3. Taxation — Tax Deeds — "Color" — Adverse Possession — Limitation of Actions.

A sheriff's deed for the nonpayment of the taxes on lands is "color" which will ripen the title in the purchaser by sufficient adverse possession for seven years.

4. Same—Tenants in Common—Statutes.

The statute permits the sheriff to sell the lands of tenants in common for the nonpayment of taxes, and a tenant in common to pay his or her part of the tax and let the other shares go; and provides that three years possession by the purchaser under the tax deed bars the former rightful owners. Rev., sec. 395 (10).

5. Same—Husband and Wife—Deeds and Conveyances.

Where the husband is a purchaser of lands held by his wife and others as tenants in common, under a sheriff's deed for the nonpayment of taxes, his adverse possession thereof for seven years will ripen the title under his deed against all except his wife, and their joint conveyance to a purchaser will convey the full title.

6. Taxation—Evidence—Tax Deeds—Deeds and Conveyances—"Seal"—Presumptions—"Color"—Adverse Possession—Limitation of Actions.

Where a certified copy of a sheriff's deed given for the nonpayment of taxes recites that the deed was under seal, the law presumes that the original deed was under seal; and were it otherwise, and the tax title does not comply with the statute, Rev., 395 (10), it is good as color of title, which seven years adverse possession will ripen into an absolute one.

7. Limitation of Actions — Tax Deeds — Adverse Possession — Evidence—Equity—Actions—Cloud on Title.

Where the purchaser of land under a tax deed for the nonpayment of taxes has used the land for such purposes as it was capable of for seven years under his deed, and his title has been ripened into an absolute one by such adverse possession, he may not be ousted therefrom upon the allegation that the relief sought is to remove a cloud upon the plaintiff's title.

8. Taxation — Tax Deeds — Conditions Precedent—Actions—Statutes—Presumptions—Deeds and Conveyances.

The plaintiff in an action to set aside a tax deed to lands must comply with the requirements of Rev., 2909, as to showing his own title at the time of the sale, the payment of all taxes due, and introduce evidence to rebut the statutory presumptions in favor of the regularity of the deed under which the purchaser claims.

APPEAL by defendants from *Calvert, J.*, at April Term, 1919, of NEW HANOVER.

This was an action to remove a cloud upon title to lands. William Grissom died intestate in 1875 seized of three contiguous tracts of land in said county. His wife died in 1889. He owned no other land in said county at his death, after which the land was listed for taxes in the name of the "heirs of William Grissom."

The court found as facts: "The sheriff executed his tax deed to the said J. W. Mintz, husband of Emily A. Mintz, dated 27 May, 1901, recorded 5 January, 1904, for '164 acres in Federal Point Township, adjoining lands of W. J. Harris, listed as heirs of William Grissom'; thereafter said J. W. Mintz and Emily A. Mintz, by like description, executed their deed to W. A. McQuillan, dated 12 June, 1903, and recorded 22 December, 1905; thereafter said McQuillan and wife, by like description, executed their deed to J. W. Harper, the ancestor of the present defendants, Harpers, dated 6 August, 1912, and recorded 7 August, 1912, which deeds appear in the record.

"J. W. Harper, the original defendant herein, has died since the commencement of this action, leaving a last will and testament under which he devised, after certain bequests, his estate to the defendants, Ella C. Harper, his wife, and to his children, Catherine and James Harper, minors; and if said sheriff's deed is valid to convey the whole of said land they are entitled thereto in fee, or if valid to convey only the interest therein of Emily A. Mintz by virtue of the deed of herself and husband to W. A. McQuillan aforesaid, then to an undivided sixth of the whole and an undivided one-fifth of one-sixth part inherited by said Emily A. Mintz from her deceased brother, Edgar A. Grissom, subject to the dower right of his wife therein, the plaintiff, Cassie P. Grissom; provided the defendant heirs of Emily A. Mintz are not entitled to inherit these interests."

The court adjudged upon the pleadings and admissions that the plaintiffs and defendants were tenants in common and that the deed above mentioned constituted a cloud upon the title, and adjudged that they had no legal effect and the cloud should be removed. The defendants appealed.

Iredell Meares for plaintiffs.
E. K. Bryan for defendants.

CLARK, C. J. The court held that the sheriff's deed "if otherwise valid did not operate to convey the whole of said premises to said J. W. Mintz, because of his relation as husband of said Emily A. Mintz, who was a tenant in common, and the title remained unchanged and the cotenancy existing between them and her as cotenants continued thereafter."

In this there was error. Mintz was not a tenant in common by reason of the fact that his wife was, and while it has been held in *Jordan v. Simmons,* 169 N. C., 140, that the husband could not buy the wife's land at a tax sale and claim title against the wife, there is no obligation growing out of the marriage contract which invalidated his purchase of the interest of the other tenants in common.

The subsequent deed of J. W. Mintz and his wife, Emily A. Mintz, 12 June, 1903, to W. A. McQuillan purported to convey the whole of said land. It was effective to convey the wife's undivided one-sixth interest and the undivided five-sixths interest acquired by J. W. Mintz under the sheriff's deed.

The deed from the sheriff to J. W. Mintz was color of title, certainly as to the interest of the tenants in common other than the wife, and her one-sixth interest was undisputed, and the seven years possession would ripen title to the five-sixths interest acquired under the tax deed.

The statute law in regard to sales of real estate for taxes permits the sheriff to sell property held by tenants in common, and provides that three years possession under a tax deed bars the rightful former owners from the recovery of the property, without exception or reservation, Rev. 395 (10), and by statute one tenant in common is permitted to pay his or her part of the tax and let the other shares go.

It is true that this Court has held that a tenant in common in actual possession of the entire property could not permit the sale of the property for taxes and acquire the title as against his cotenants. *Smith v. Smith,* 150 N. C., 81. But this was put distinctly upon the ground of the tenant's occupancy of the entire property and his breach of duty in allowing the sale to take place, and in taking advantage of his own wrong by purchasing the property, but here the purchaser was not a tenant in common.

Indeed, Mintz was not a tenant in common at all, and there was no reason why he could not purchase the interest of all the cotenants except the interest of his wife, and that she conveyed by joining in the deed with her husband to convey the entire property to McQuillan, who afterwards conveyed to Harper.

In this case the husband of the tenant in common was not charged with the same trust that his wife would have been had she been in occupancy of the entire property. The tax deed was color of title to Mintz, the purchaser at the tax sale of all interests in the land except the wife's, and seven years occupancy would bar the recovery by the other tenants. Rev., 395; *Kivett v. Garner,* 169 N. C., 78; *Dobbins v. Dobbins,* 141 N. C., 210.

It was said in *Lumber Co. v. Cedar Works,* 168 N. C., 344, that the doctrine of possession by tenants in common would not be extended further than the Court has heretofore gone. In this case exclusive possession was taken by Mintz as purchaser, who was not a tenant in common and was retained by him. He did not buy from one tenant in common, but from the sheriff. His wife alone might claim that by his purchase of the other five-sixths interest he was tenant in common with her, but by joining with him in the deed to McQuillan, 12 June, 1903, they conveyed the entire interest, at least their deed was color of title, and McQuillan had the right to claim title to the whole and continue possession under said deed. He was not a tenant in common buying at the tax sale.

In *Everhart v. Adderton,* 175 N. C., 403, the Court said: "The purchaser was not a tenant in common, but merely the wife of one of them." There was evidence of seven years adverse possession which would ripen the title in said McQuillan and those claiming title under him. *Gill v. Porter,* 176 N. C., 451.

In this view it is unnecessary to consider the allegations of irregularities in the sale for taxes and whether they were cured by the presumptions of regularity raised by the statute regulating sales of realty for taxation. The tax deed to Mintz and the subsequent conveyance by him to McQuillan being color of title which would ripen by seven years adverse possession by said McQuillan and those claiming under him, the defendants are entitled to have an issue submitted to the jury upon that question, and also as to the three years possession under the tax deed.

An issue should also be submitted to the jury as to the identity of the land claimed by the plaintiffs and the defendants which is denied by the pleadings.

The court erred in holding as a matter of law that the deeds from the sheriff to Mintz and from Mintz and wife to McQuillan and Harper constituted the defendants cotenants with the plaintiffs.

The certified copy of the sheriff's deed does not show a seal, but it recites that the deed was under seal, and in such case the law presumes that a seal was on the original deed. *Brown v. Hutchinson,* 155 N. C., 205; *Edwards v. Supply Co.,* 150 N. C., 173; *Smith v. Lumber Co.,* 144 N. C., 47; *Heath v. Cotton Mills,* 115 N. C., 208.

Even though there is no seal, and the tax title does not comply with the statute, it is good as color of title, and seven years occupancy is sufficient to ripen the title in the possessor. *Kivett v. Garner,* 169 N. C., 78; Rev., 395 (10). And this was expressly pleaded by the defendants.

It would seem that the description in the tax deed was sufficient. *Fulcher v. Fulcher,* 122 N. C., 101.

The relief demanded in the complaint is to remove a cloud upon title. This was doubtless because, as it seems, no one was in actual physical possession at the time the action was brought, but the relief demanded does not govern the remedy, which depends upon the facts admitted or proven. If the jury shall find from the evidence that the defendants or those under whom they claim were in such possession as the nature of the premises permitted of, as cutting wood or otherwise, and exercised such dominion over the premises for seven years under the tax deed, then the defendant acquired title.

There was evidence of cutting wood and using other exclusive dominion over the property, and that McQuillan built a house upon the property in which he lived and cultivated land upon it, and if the jury shall find that the defendants and those under whom they claim were in adverse possession of the land for seven years under color of title, then they cannot be ousted therefrom upon the allegation that the relief sought is to remove a cloud for his ripened title is title and not a cloud upon title.

Besides, the plaintiffs have not complied with the requirements of Rev., 2909: "No person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without first showing that he or the person under whom he claims title had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title." Nor have the plaintiffs put in any evidence to rebut the presumptions in favor of the regularity of the deed which are recited in that section. Then there is the provision as to the matters in regard to which the deed is conclusive proof.

The conditions precedent required in that section for bringing an action to set aside a tax deed cannot be avoided by the plaintiff's styling this action to be for the purpose of "removing a cloud from title."

Action dismissed.

ATLANTIC COAST LINE RAILROAD COMPANY v. BRUNSWICK COUNTY.

(Filed 15 October, 1919.)

1. **Taxation—Payment—Protest—Statutes—Actions.**

Where, in conformity with the provisions of Rev., sec. 2855, a person has paid an assessment or tax for State and county purposes against his property, and at the time thereof has notified the sheriff in writing that he paid it under protest, and within the thirty days he has demanded the same in writing from the officer therein designated, and the same is not repaid within the ninety days required by the statute, the party so acting has a present right of action for the recovery of the tax without the necessity of having made the presentation and demands to the proper municipal authorities referred to in Rev., sec. 1384, as to auditing and examination of claims, etc., or to the chairman of the board of county commissioners, referred to in Rev., sec. 396, the later act, Rev., 2855, being regarded as an exception to the general requirements of the preceding ones—secs. 1384, 396.

2. **Pleadings — Demurrer — Frivolous — Courts — Discretion — Appeal and Error.**

The action of the trial judge in refusing to hold a demurrer as frivolous and allowing the defendant to plead over, except perhaps in the absence of a great abuse of this power, is within his sound legal discretion, and not reviewable on appeal.

Action under sec. 2865, Rev., to recover an amount of taxes agreed to have been unlawfully and wrongfully collected from plaintiff, heard on demurrer to complaint before *Calvert, J.,* at June Term, 1919, of Brunswick.

There was judgment overruling demurrer, and defendant excepted and appealed.

Rountree & Davis and Cranmer & Davis counsel for plaintiff.
C. Ed. Taylor counsel for defendant.

Hoke, J. The statute under which the present action is instituted (Rev., sec. 2855), on matter relevant to this inquiry, provides as follows: "Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the Treasurer of the State or of the county, city or town, for the benefit or under the authority or by the request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city or town for the amount so demanded, including in his action against the county both State and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases."

In the present instance the complaint alleges that for the year 1914 there was collected from plaintiff company illegal taxes to the amount of $824.67, setting forth with fullness and detail the facts showing the illegality complained of and the amount as stated. It also states that at the time of payment the company, through its duly authorized officers, filed a written protest with the sheriff of the county, and within thirty days made formal demand in writing on the county treasurer, and containing notice that if the tax so wrongfully collected was not refunded in ninety days, action would be brought under Rev., sec. 2855, etc.

Defendant's demurrer is on the ground that no previous demand had been made of the proper municipal authorities that the claim be audited and examined as required by sec. 1384, Rev., nor to the chairman of the board of county commissioners, as contemplated and directed by sec. 396.

The complaint having averred full compliance with all the preliminary requirements of sec. 2855, the statute in explicit terms authorizes the suit. There is no reason for requiring further demand when, in the protest and the demand on the treasurer, which was required to be made in writing, the county officials were fully informed of the nature and amount of the claim, and we are of opinion that by correct interpretation this section confers a present right of action without making the presentation and demands referred to in the sections of Revisal upon which defendant relies. *R. R. v. Reidsville,* 109 N. C., 494. Under proper construction this later act, under which the suit was brought, must be regarded as an exception withdrawing claims controlled by it from the operation and effect of the general requirements of the former portions of the law. *Cecil v. High Point,* 165 N. C., 431; *Rodgers v. United States,* 185 U. S., 83; 1 Lewis' Sutherland Stat. Construction, sec. 268.

While we approve his Honor's judgment overruling the demurrer, we do not concur in the view insisted upon by the appellee that the demurrer is so devoid of merit that it should be held frivolous and judgment entered in this Court for the sum demanded. Apart from this, the question has not been passed upon in court below, and our later decisions on the subject are to the effect that even when frivolous this matter in the first instance is referred to the "sound discretion" of the trial judge and that his judgment permitting a defendant to answer over will not be interfered with, except perhaps in case of great abuse, nor can his action be reviewed by appeal. *Parker v. R. R.,* 150 N. C., 433, citing *Dunn v. Barnes,* 73 N. C., 273; Clark's Code (3d Ed.), sec. 272, p. 295, and notes; *Morgan v. Harris,* 141 N. C., 360; *Walters v. Starnes,* 118 N. C., 842; *Abbot v. Hancock,* 123 N. C., 89.

There is no error, and judgment overruling demurrer is
Affirmed.

NADA R. McDONALD ET AL. *v.* ALFRED G. HOWE ET AL.

(Filed 15 October, 1919.)

1. Judgments—Unsigned—Statutes Directory.

An unsigned judgment passed in open court and filed with the papers in the case as a part of the judgment roll is valid, the requirement that it should be signed by the judge being only directory.

2. Judgments—Subsequent Term—Nunc Pro Tunc.

Judgment may be entered at a succeeding term of the court, *nunc pro tunc*, in proper instances.

3. Wills—Interpretation—Intent—Estates—Contingent Limitations—Title.

A will should be interpreted to effectuate the intention of the parties, and a devise of land to the two daughters until they should become of age "when it becomes theirs," vests the absolute fee-simple title in them upon their becoming of age; and a further provision, should they die, "leaving sister or sisters or brother or brothers of their mother's children, the sister or sisters or brother or brothers shall inherit the property," is construed to indicate the intention of the testator that the brothers or sisters would take upon the happening of the contingency of the death of the daughters before reaching the age specified.

4. Wills — Estates — Contingent Limitations — Interpretation — Vesting of Title.

A devise will take effect at the earliest moment that its language will permit, which in this case is the arrival at the age of twenty-one of the testator's daughter. Rev., sec. 1581, as to limitations contingent upon any person dying without heirs, has no application.

APPEAL by plaintiff from *Calvert, J.*, at April Term, 1919, of NEW HANOVER.

Mary Washington Howe, the aunt of the plaintiffs, provided in her will as follows: "The remainder of my property I give to my sister, Rebecca Jane McDonald, for her use until her daughters, Nada Roberta and Alfreda Eloise, become of age, when it becomes theirs. Should Nada and Alfreda die, leaving sister or sisters, brother or brothers, of their mother's children, the sister or sisters, brother or brothers, shall inherit the property here mentioned. Should they die, the property is to be sold and proceeds divided between the children of my brothers, John T. Howe and A. P. Howe."

This proceeding is to have the adverse claims of the defendants set aside and to have the plaintiff declared the owner in fee of the land described in the will.

The plaintiffs, Nada Roberta and Alfreda Eloise McDonald, are both of age. The defendants are their minor sisters who through their guardian *ad litem* demurred to the complaint upon the ground that it does not state a cause of action because it appears from the will under which the plaintiffs claim the land that they "were only given a life estate in said property and not the fee, and at most they only own a determinable fee, and that in the event they should die leaving a brother or sister of their mother's children that the fee simple estate would be given to such brother or sister; and this being true, the plaintiffs are not entitled to have the court adjudge that these defendants have no interest in said property and that the plaintiffs own the same in fee simple." The other defendants are the sons of John T. and A. P. Howe.

The case coming before Stacy, Judge, at Fall Term, 1918, he sustained the demurrer and held that the plaintiffs were not the owners in fee of the land described in the complaint, but the court adjourned before the judgment sustaining the demurrer was signed.

The case was brought before Calvert, Judge, at April Term, 1919, of the same court, who ruled that "plaintiffs are not the owners in fee of the land, but only have a life estate therein, or at most a determinable fee, and therefore are not entitled to the relief prayed for" and dismissed the action. Appeal by plaintiffs.

A. S. Williams for plaintiffs.
No counsel contra.

Clark, C. J. There was no irregularity upon the face of the proceedings. This Court has repeatedly held that the requirement that a judgment should be signed by the judge is "only directory and a judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge." *Range Co. v. Carver,* 118 N. C., 328, citing *Rollins v. Henry,* 78 N. C., 342; *Matthews v. Joyce,* 85 N. C., 258; *Keener v. Goodson,* 89 N. C., 273; *Spencer v. Credle,* 102 N. C., 68; *Bond v. Wool,* 113 N. C., 20.

Even if the judgment should have been signed, the record could be completed by entering judgment *nunc pro tunc* at a succeeding term of the court. *Ferrell v. Hales,* 119 N. C., 212, and cases there cited, which has been approved in *Taylor v. Ervin,* 119 N. C., 274; *Knowles v. Savage,* 140 N. C., 374; *Brown v. Harding,* 171 N. C., 687; *Hardware Co. v. Holt,* 173 N. C. 311; and especially in *Pfeifer v. Drug Co.,* 171 N. C., 216, where the authorities are fully cited.

In the construction of a will the object is to arrive at the intention of the testator. The testator here gave her daughter the property until her daughters, the plaintiffs, should become of age, "when it becomes theirs." These words indicate an intention that the property should be theirs absolutely upon the happening of that contingency. The words "Should Nada and Alfreda die, leaving sister or sisters, brother or brothers, of their mother's children, the sister or sisters, brother or brothers shall inherit the property herein mentioned" indicate, we think, an intention that should the contingency fail upon which the plaintiffs should have the property absolutely, i. e., should they die before arriving at age, then this property should go to their sisters or brothers. The further clause, "should they (evidently meaning such sisters or brothers) die, the property to be sold and the proceeds divided between the children of my brothers, John T. Howe and A. P. Howe," presents more difficulty, but we need not consider that since the property having become absolutely the property of Nada and Alfreda by their arriving at age, the contingency upon which the property should go over to the children of John T. and A. P. Howe cannot happen.

It is the policy of the law that a devise should take effect at the earliest moment that the language will permit, which in this case is the arrival at age, at which time the property should become vested in fee. The Act of 1827, now Rev., 1581, construing limitations contingent upon any person dying without heirs, has no application to this case.

The plaintiffs, we think, acquired a fee simple absolute upon their arriving at twenty-one.

Reversed.

MATILDA A. HAYDEN v. JOHN HENRY HAYDEN ET ALS.

(Filed 15 October, 1919.)

1. **Deeds and Conveyances — Descriptions — Mistakes—Boundaries—Correction—Equity.**

   A description of land in a deed making the beginning point on the eastern side of a certain side of a city street will be read to meet the intended description, as beginning on the western side of the street, when it refers to a plat by which it is evident that to place such beginning as designated would take the street into the lot, and by placing it on the western side it would fit the description of the deed (except as to this point,) and the map of the lot referred to by block and number.

2. **Same—Maps—Inconsistent Descriptions.**

   Where a deed contains two descriptions of the lands, one by metes and bounds and the other by lot and block, according to a certain plat or map, the controlling description is the lot according to the plat or map.

3. **Executors and Administrators — Substituted Trustee—Courts—Estoppel —Parties—Statutes—Trusts.**

   Where an executor under a will with power to sell the lands of his testate and reinvest the proceeds, etc., has died, and all persons in present and contingent interest have been made parties to an action (Rev., 1590) wherein the court has substituted another as trustee, upon like trusts in every respect, and the decree was not appealed from, all the privies and parties are estopped as to all issuable matters therein, and may not deny the power of the substituted trustee to make sale of the lands as fully as the executor under the will was therein authorized to make.

4. **Deeds and Conveyances — Wills — Trusts—Substituted Trustee—Color—Adverse Possession—Limitation of Actions.**

A deed made by a trustee substituted by order of court for one named in a will, with power of sale, is color of title which will ripen into an absolute one by sufficient adverse possession for the statutory periods, there being no infants interested, the suspension of the statute as to married women having been repealed.

5. **Limitation of Actions—Trusts—Cestui que Trustents.**

Under the facts of this case it is *held*, that where a substituted trustee for an executor under a will is barred by the statute of limitations, the *cestuis que trustent* are also barred.

6. **Torrens Law—Deeds and Conveyances—Parties—Estoppel—Statutes.**

Where a commissioner has sold land in conformity with the Torrens system, his deed cuts off the rights of all persons in being or hereafter to come into being. Rev., 1590.

WALKER, J., did not sit.

APPEAL by defendants from *Calvert, J.,* at May Term, 1919, of NEW HANOVER.

P. H. Hayden died in 1903, testate, leaving, besides other property, the real estate which is the subject of this action.

An action was brought in the Superior Court of New Hanover for the purpose of selling said land by judicial sale, freed and discharged of all contingent remainders or other interests in said property. In that action an order was made at October Term, 1918, appointing E. K. Bryan, commissioner, with the direction to sell said land. At this sale the respondent, Joseph W. Little, was the last and highest bidder, and at April Term, 1919, the said bid was confirmed and the commissioner ordered to execute a conveyance for the property.

After this was done, the petitioner, Joseph W. Little, not being actually aware of the motion for confirmation, had the title to the property examined by counsel, who found certain irregularities which, in his opinion, rendered the title to the property doubtful.

A petition was filed at May Term, 1919, by E. K. Bryan, commissioner, in which it was sought to have the title adjudicated to be good and a judgment directing the purchaser, Joseph W. Little, to accept the deed and pay the purchase money. To this petition the respondent filed answer, in which the objections to the title were set up.

A jury trial was waived and the case was heard orally by Calvert, J., who rendered judgment that the title to the said property was good, and the respondent, Joseph W. Little, was ordered to pay the purchase price and accept the deed, to which he excepted and appealed.

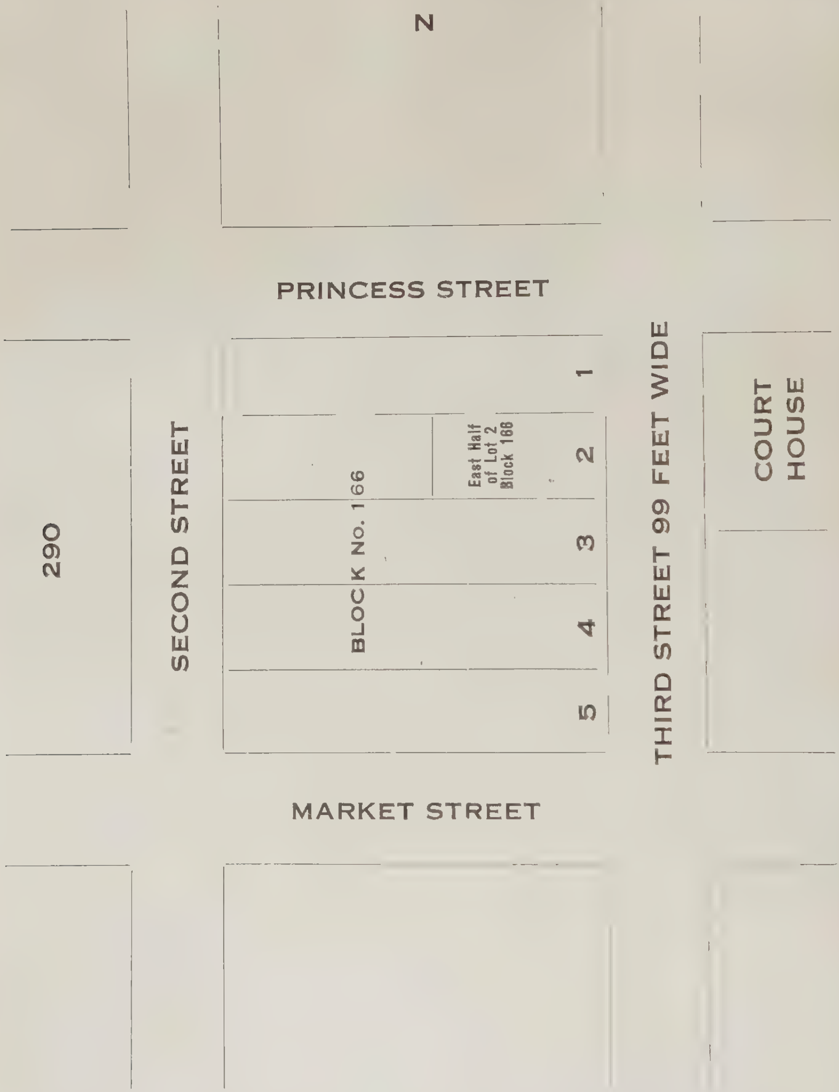
E. K. Bryan for plaintiffs.
Rountree & Davis and Geo. H. Howell for respondent Little.

CLARK, C. J. This appeal is intended to raise the single question whether the title to the property is good and marketable. The respondent is desirous to complete the purchase, but intending to expend large sums, he is unwilling to do so without an adjudication that the title is good. It seems that all persons who can, in any contingency, have an interest in the property have been made parties. It is admitted that the procedure authorized in *Shields v. Allen,* 77 N. C., 375, has been followed in raising the question of title for adjudication.

The first exception is that the court held that the word "eastern" in the description in the deed from McRee, trustee, to Hayden should be read "western." The *locus in quo* lies on the west side of Third Street in Wilmington, opposite the courthouse, but the deed makes the beginning point "in the eastern line of Third Street, 66 feet southwardly from its intersection of Princess Street," instead of "in the western line of Third Street," etc.; thence "westwardly and parallel with Princess Street 165 feet." Third Street being 99 feet wide, the language used would put 99 feet of the lot in the street, which is no part of "Lot No. 2, in block 166, according to the plan of Wilmington." The deed in describing the property says: "The same being the eastern half of lot No. 2, in block 166, according to the plan of said city." Changing "eastern" to "western" the description fits the *locus in quo* in every respect. It is apparent that the draftsman in writing the beginning as being "in the eastern line of Third Street" meant the eastern line of the lot on Third Street. The court properly held that the word "eastern," when speaking of the beginning on Third Street, should read "western line of Third Street." Such correction, when there is a patent error as here, has often been upheld by this Court. *Fowler v. Coble,* 162 N. C., 500; *Ipock v. Gaskins,* 161 N. C., 73; *Brown v. Myers,* 150 N. C., 441; *Wsieman v. Green,* 127 N. C., 288; *Mizell x. Simmons,* 79 N. C., 190.

Where the deed contains two descriptions, one by metes and bounds and the other by lot and block according to a certain plot or map, the controlling description is the lot according to the plan, rather than the one by metes and bounds. *Nash v. R. R.,* 67 N. C., 413. It appears from the records entirely certain upon the face of the deed that the parties intended to convey the eastern half of lot No. 2, in block 166.

The second assignment of error is because the court held that Joseph H. McRee, the trustee appointed in the place of Robert H. Cowan, could convey a good title to Hayden, and that therefore the purchaser would get a good title. It appears from the will of Dr. J. F. McRee that he devised this property to "Robert H. Cowan and his heirs in trust for the separate use of my daughter-in-law, Sarah J. McRee, wife of my



son James, during her life and at her death in trust for her children, by my said son James, and I do hereby empower the said Robert Cowan, whenever he may deem it necessary or advantageous, to sell the said lot and reinvest the money in other property, real or personal, to be held on the same trusts as are herein expressed in relation to said land."

Col. Robert H. Cowan, the said trustee, died without having sold this property, and at April Term, 1873, of New Hanover, in an action brought by the beneficiaries under said item of the will against the executor and heirs at law of Cowan; J. H. McRee was substituted as trustee, and it was decreed that he should "hold and possess all the property, real and personal, which was devised and bequeathed by the said James F. McRee in trust, upon the like trusts in every respect that the same were held and possessed by Robert H. Cowan, late trustee."

Under the authority of such decree said McRee, trustee, sold the property to J. H. Hayden. The contention of the respondent is that the power of sale given to Robert H. Cowan, trustee, being in the nature of a personal discretion, did not pass to the substituted trustee, citing *Young v. Young,* 97 N. C., 132.

Without impeaching in any respect the entire correctness of that decision, the decree made in this case conferred upon Joseph H. McRee the property "upon the like trusts, in every respect, that the same were held and possessed by Robert H. Cowan, late trustee." The terms of this decree are very broad and vested in the substituted trustee, in every respect, every power possessed by Robert H. Cowan. This decree was not appealed from, and is therefore valid and binding in every respect.

Besides, the beneficiaries of the trust who would be entitled to object to the sale are cut off by the decree as they were made parties under the following language: "And all persons unknown to the plaintiffs who may have an interest in the lands and premises described in the complaint, or may possibly come into being, or may possibly have an interest in the same." Rev., 1590; *Ryder v. Oates,* 173 N. C., 572.

By virtue of the decree unappealed from the trust in the hands of Joseph H. McRee, trustee, was coextensive with and as effective as if he had been named in the will of James F. McRee originally as trustee instead of Cowan. *Baugert v. Blades,* 117 N. C., 228; *Ferebee v. Sawyer,* 167 N. C., 199; *Clothing Co. v. Hay,* 163 N. C., 495; *Bank v. Dew,* 175 N. C., 79.

The whole subject is fully discussed and clearly stated, with great wealth of authorities, by *Hoke, J.,* in *Ferebee v. Sawyer,* 167 N. C., at p. 203, quoting and approving the following from *Coltrane v. Laughlin,* 157 N. C., 282: "It is well recognized here and elsewhere that when a court having jurisdiction of a cause and the parties renders judgment therein it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing."

Besides, the deed of the substituted trustee to Hayden was color of title, and under our statutes of seven, twenty, and thirty years possession is a good and marketable title by operation of law under the facts shown in this case. The lot was in front of the courthouse in the city of Wilmington, and possession of the same was fully established. The "color of title" is not impaired by the fact that the word "eastern" in the deed should have read "western." It is in evidence that Hayden went into possession of the property in 1878, which was forty years before the bringing of this action, and there cannot possibly be any infant, and the suspension of the statute as to married women was repealed by the act of 1899. The trustee being barred, the *cestuis que trustent* are equally barred. *Barden v. Stickney,* 132 N. C., 417; *Kirkman v. Holland,* 139 N. C., 189; *Webb v. Borden,* 145 N. C., 197.

If it were open to serious debate whether the will of J. F. McRee gave a fee tail to Sarah J. McRee, special, upon the death of Cowan, the statute executed the use by converting the estate into a fee simple. *Cameron v. Hicks,* 141 N. C., 21. She and all her children were parties to the proceeding in which Joseph H. McRee was appointed substitute trustee with the same rights as those possessed by Robert H. Cowan, and the purchaser under him received by his deed the legal and equitable title.

Finally the suit brought to sell this property complies in every particular with the requirements of the Torrens System, and the title deed by the commissioner would cut off the rights of any other person in being or hereafter to come into being, as an attorney was appointed by the court to represent such possible or contingent interests. *Ryder v. Oates,* 173 N. C., 572; Rev., 1590.

Upon the entire record the title was a good and indefeasible title.

Affirmed.

ROWLAND BARNES, ADMINISTRATRIX, v. SEABOARD AIR LINE RAILROAD COMPANY AND AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 15 October, 1919.)

Employer and Employee—Master and Servant—Carriers of Goods—Railroads—Express Companies—Negligence—Concurring Negligence—Evidence—Nonsuit—Trials.

The defendant express company hired among the bystanders, including the plaintiff's intestate, men to help put a shafting, weighing about 2,000 pounds, from its trucks into its express car. There was evidence tending to show that the trucks were properly placed at first with reference to the car door, and when the men were in the act of placing the front end of the shafting in the car door the codefendant railroad company suddenly started the train, moving it about thirty feet, making it necessary to change the direction of the shafting. The trucks could not be placed at right angles, the proper position, because of express packages there, and while loading in this position the end of the shafting slipped from the truck and caused the death of the intestate; that had the trucks been at right angles to the car door, as formerly, the injury would not have been inflicted, and that in the then position of the trucks insufficient help was furnished for the safe loading of the shafting: *Held*, error to exclude testimony of one of long experience in such work as to the danger of loading the shaft under the changed conditions; that the one holding the handle of a truck was agent of the express company, that its station agent was present, their negligence, if any, being that of defendant express company, as also the answer of a witness to a question to state from what he saw the cause of the dropping of the shaft from the truck; and further, *held*, under this and the other testimony, sufficient for the jury upon the question of defendant express company's failing to use reasonable care; concurrent negligence of defendant railroad in moving its train under the circumstances, contributing to the death of the intestate, and the negligent failure of defendant express company in failing to furnish sufficient and experienced help.

WALKER, J., dissenting; ALLEN, J., concurring in the opinion of WALKER, J.

APPEAL by plaintiff from a nonsuit directed by *Stacy, J.*, at March Term, 1919, of ROBESON.

Johnson & Johnson for plaintiff.
McIntyre, Lawrence & Proctor for railroad company.
McLean, Varser, McLean & Stacy for express company.

CLARK, C. J. This was an action for the wrongful death of plaintiff's intestate, a farmer about twenty-one years of age, who had come to Lumberton on some business. While at the station of the defendant railroad company the agent of the express company engaged him to help load a heavy iron shafting on the express car in the defendant railroad's eastbound train. The shafting was 20 to 30 feet long, about 8 inches in diameter, in a box about 12 inches square, and estimated to weigh about 2,000 pounds. The loading was done under the supervision of the agent of the express company, who hired three bystanders to assist the clerk of the express office. The agent was a lady and rendered no assistance beyond her supervision. The shafting was placed on two trucks at right angles to the door of the express car. The deceased was one of those who had hold of the end of the shafting nearest the express car and the others were on either side of the box behind him. While the men were in the act of placing the front end of the shafting in the car door the defendant railroad company suddenly, without warning, started the train, moving it up about thirty feet, which made it necessary to change the direction of the shafting. Express packages had been piled on the ground and on that account the truck farthest from the train could not be moved up so as to be at right angles to the door again. The truck nearest the train was moved forward to the express car door in its new position and it was then removed, leaving the front end of the shafting on the shoulders of the four or five men while the other end rested on the extreme corner of the rear truck, where the men bearing the front end and looking towards the car door could not see it. In the attempt to shove the boxed shafting into the car, in this diagonal manner, there was nothing to prevent it rolling off the truck but there would have been if the shafting had been shoved in at right angles. All of the men were near the car door as it naturally required their united strength to lift the front end of the 2,000-pound package. The rear end of the shafting twisted off the rear truck as the change to a diagonal had moved it to the corner of that truck from which it tumbled, falling to the ground with great violence. The end nearest to the train bounded upward with such violence that it was forcibly wrested from the shoulders of the men who were carrying it and the deceased, who was in the acute angle nearest the train, was caught between the shafting and the train and his skull smashed causing his death.

The witness Holloway, who was a lumber man with thirty years experience in doing similar work to loading this shafting, testified that the method pursued in attempting to put on the shafting after the moving forward of the car looked so dangerous to him that he was tempted to protest but refrained from doing so for fear he might seem officious. He further testified that when the shafting was first placed for loading at right angles to the train it was squarely on the truck and would not have fallen off, but that in moving the end next to the train after the train had pulled up the further end of the shafting was turned diagonally on the extreme edge of the truck, and no one was there nor any effort made to keep the shafting from falling off. This witness also testified that if the shafting could have again been placed at right angles to the car it could have been loaded with safety because it would not have rolled off the truck. The evidence showed, however, that the express had been piled on the ground in such manner that it was impossible to move the truck around in a suitable position, that is, at right angles to the train. The train was not moved back 30 feet to the original position, thus avoiding the danger of attempting to put the shafting on in this diagonal manner. The agent of the express company was standing there, and also a clerk in the express office who had hold of the truck handles and could see the position of the rear end of the shafting, but no effort was made to adjust the shafting or place some one there to hold it, and it is doubtful if one man could have done this when the movement of the four or five men at the front end would necessarily constantly change the position of the shafting on the rear truck.

The plaintiff also offered to show that the witness Davis, who was clerk of the express company at the time deceased was killed, was employed for the company by Mrs. Thomas, its agent at that station, to assist her. It was error to exclude this, as it tended to show that he was a vice-principal, and as such had charge of loading the shafting, and his conduct in failing to place some one at the rear truck to prevent the falling of the shafting, if found to be negligent, was the negligence of the company and not that of a fellow-servant of the intestate, who was a bystander picked up for the occasion. It was also error to exclude the testimony that Mrs. Thomas, the agent of the express company, was present superintending the loading of the shafting, for her negligence, if any, in supervising the loading, was also that of the company.

It is not denied that the falling of the shafting from the truck was the immediate cause of the death of the deceased. The witness Holloway, who was present and described very intelligently the whole occurrence, was asked, "From what you observed of it, what caused the shafting to drop from the truck and fall to the ground in the manner you have described?" This was excluded as opinion evidence, which was error, for he was asked to state what he saw. It may be that he would have said that the moving of the train forward causing the diagonal position of the shafting in order to put it on the car caused the falling of the rear end from the truck, or he may have given some other reason. We do not know exactly what he would have said, but the plaintiff was entitled to have the facts laid before the jury that they might have drawn their own inferences as to the cause of the injury. This, therefore, was error as to both the defendants. He was also asked, "State what effect the pulling of this train up some thirty feet, as you describe, had upon the ability of these men to load it upon the car." He answered, "It put the shafting in a very much more unsafe position than it was at first." On motion of the defendant railroad company this answer was stricken out, which was a very material error. This witness without objection had stated that he had had experience for thirty years as a sawmill man in loading timber, and that in his opinion a sufficient number of men were provided to properly load the shaft into the train when the shaft was in the original position, but in the new position, where the thing actually happened, it looked pretty dangerous to him. This was evidence sufficient to go to the jury tending to show negligence of the defendant railroad in suddenly moving the train thirty feet forward and in not moving it back to the original position when the shafting had been properly placed for loading at right angles to the train. The authorities in charge of the train saw the position of the shafting and stopped the car at that point where this witness stated that it could have been safely loaded. The defendant railroad has given no evidence or explanation why the car was suddenly moved forward nor why it did not move the train back to the original position, though the witness stated that the change of position made the loading very much more unsafe.

There was evidence that the express car was something like eight feet wide on the inside and the doors were about five feet wide. It is a matter of common observation, hardly needing evidence, that four or five men could not lift a piece of shafting 2,000 pounds in weight, but if it was placed at right angles to the car and shoved forward eight feet into the car so as to relieve that much weight, the four or five men could then take hold of the rear end and by "slewing" it around shove it forward into the car. The witness Holloway testified that the loading could have been done in that manner, that is, by the shafting being put in at right angles, by four or five men. It would be a reasonable inference from the evidence, and from the knowledge of the jurors themselves, that if the weight of the front end was not thus reduced by being put in the car that it would have taken double the number of men or more to lift up the shafting and put it in.

The witness testified that to attempt this work in the way which became necessary after the car was moved forward was very much more dangerous.

The Court has held in many cases that the testimony of the witness from his own observation as to the cause of the accident was competent. *Britt v. R. R.*, 148 N. C., 37; *Arrowood v. R. R.*, 126 N. C., 632; *Raper v. R. R., ib.*, 565; *Burney v. Allen,* 127 N. C., 476. In *Britt v. R. R., supra,* it was held competent to ask the witness, "State whether or not in your opinion you could have straightened the log on the skid before it fell and hurt you by the use of your cant-hook, if the team had not started." It was therefore competent for the witness in this case to state that the shafting could have been safely loaded on the car when it first stopped where the shafting was at right angles to the door, but that the moving of the car forward by causing the attempt to load the shafting diagonally caused the injury. This was evidence to go to the jury of the negligence of the railroad in moving the car suddenly forward and in not moving it back.

In *Britt v. R. R., supra,* the Court stated the principle as follows: "The exception to the general rule that witnesses cannot give their opinion is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning, but it includes the evidence of common observers testifying to the result of their observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury."

Among many other cases than those just cited to this purport are: *S. v. Edwards,* 112 N. C., 901; *Taylor v. Security Co.,* 145 N. C., 389; *Ives v. Lumber Co.,* 147 N. C., 308; *Bennett v. Mfg. Co., ib.,* 621; *Murdock v. R. R.,* 159 N. C., 132.

There was evidence in this case tending to show that plaintiff's intestate was killed, without any fault of his, while engaged in the proper performance of the duty for which he was employed under the personal supervision of the agent, and also of the clerk or assistant agent of the express company, and tending to show that there was negligence in the loading of the shafting due in part to the railroad company moving the car and in not moving it back when it saw the situation in which this had placed those who were loading the shafting. Whether the conduct of the loading, if negligent, was the negligence of both defendants or of one only was a matter for ascertainment by the jury. The manner of loading called forth exclamations from bystanders. There was evidence which tended to show that the deceased came to his death not as a result of an unavoidable accident, but as the direct and proximate result of the negligent acts of the defendants.

The shafting was of enormous weight, some 20 or 30 feet long, and three inexperienced men picked up from the bystanders at the station, with the assistance of the driver and clerk, were used to put it on the car.

Without repeating the evidence, it is sufficient to say there was evidence sufficient to go to the jury tending to show:

1. That the express company failed to furnish plaintiff's intestate with a sufficient number of competent, experienced fellow-servants.

2. That both defendants failed to use reasonable care and precaution for the safety of plaintiff's intestate.

3. That the defendant railroad company, in suddenly pulling up its train while plaintiff's intestate and his fellow-servants were in the act of loading the shafting in a safe manner, contributed to the death of the deceased, and this, concurrently with the negligence of the express company, was the proximate cause of the death of plaintiff's intestate.

To recapitulate the testimony more fully and cite apposite precedents might prejudice the cause of the defendants on another trial. It is sufficient to say, and we intend to say no more than that, that there was evidence sufficient to go to the jury tending to show that the death of the intestate was caused by the concurrent negligence of both defendants. It may be that on fuller development of the case it may appear that neither, or only one, of the defendants was guilty of negligence that contributed to the death of the plaintiff's intestate.

It is proper to say that in preparing this opinion we have been very much aided by the very intelligent and fair statement of the facts and of the law set out in the brief of the learned counsel for the plaintiff.

The nonsuit must be set aside as to both defendants.

Reversed.

WALKER, J., dissenting: I cannot agree with the conclusion of the Court in respect to the liability of the defendant Seaboard Air Line Railway Company, because I am convinced, after a careful perusal of the evidence and a deliberate consideration of it, that there is none which implicates the railway company as a negligent or delinquent defendant, and if there was negligence on the part of its codefendant, the express company, the railway company did not participate therein, by cooperation or otherwise, nor was it in any way to blame, in law or in fact, for the accident, whereby the plaintiff's intestate was killed. My opinion, therefore, is that the nonsuit as to the railway company was properly entered by the Superior Court, and that its ruling in that regard should be sustained.

ALLEN J., concurring in dissent.

LONZA MONTAGUE ET AL. v. SOL LUMPKINS ET AL.

(Filed 15 October, 1919.)

1. Judgments—Default Trial—Pleadings.

Upon allegations in the complaint of defendant's express promise to pay a definite sum of money, a judgment by default final upon failure to answer, in plaintiff's favor, is regularly entered.

2. Same—Motions to Set Aside—Affidavits—Allegations—Presumptions.

To set aside a judgment by default for the want of an answer it is necessary to allege matters which, if true, will establish a defense, the presumption being in favor of the judgment.

3. Same—Contracts—Quantum—Meruit—Damages.

A judgment by default final for want of an answer was rendered on a contract for the sale of leaf tobacco at stated price upon the delivery of several different grades, the entire purchase price being $1,000, if it should weigh 3,000 pounds, "but if less, only $900": *Held*, the contract will be construed as a whole to effectuate the intent of the parties, as a matter of law, and thus construed it appears that the defendant has sold his entire crop of tobacco, with the presumption that the contract of sale provided for the different contingencies, and against a *quantum valebat* as to the purchase price; and an affidavit upon a motion to set aside the judgment, in effect denying that the plaintiff had delivered as much as 3,000 pounds of the tobacco, is insufficient.

4. Judgements — Default—Trial—Motions—Affidavits—Damages—Attorney and Client.

Upon motion to set aside a judgment by default final, for the want of an answer rendered upon a contract for the sale of so many pounds of leaf tobacco at a stated price, the affidavit of the defendant's attorney set forth among other things that the tobacco delivered to the defendant was in such damaged condition as to greatly decrease its value and was not up to the quality that it was in at the time of the purchase, etc.: *Held*, too indefinite, for it does not show that the plaintiff was not responsible for the damages; and further, insufficient as coming only from the attorney, who could only speak by hearsay.

APPEAL by defendants from *Allen, J.*, at June Term, 1919, of WAKE.

This is a motion to set aside a judgment on the ground of excusable neglect.

The action is to recover a balance of $300 alleged to be due for tobacco sold and delivered to the defendants under the following contract:

"This is to certify that I have bought Lonza Montague's crop of tobacco for one thousand dollars, not less than three thousand pounds, one lot of tips, next to tips, and primings graded. He is to draw six hundred dollars when tips is delivered, three hundred when the next load, and one hundred when the last is delivered, if there is 3,000 pounds.

16 October, 1918.

(Signed) LUMPKIN & PERRY,
Per J. R. P."

The plaintiffs filed a duly verified complaint, alleging the delivery of the tobacco to the defendants and the payment of $600 thereon.

It was not alleged that there were 3,000 pounds of the tobacco.

The plaintiffs also alleged that the defendants owed them $24.16 for stripping the last load of tobacco which they had promised to pay.

One of the defendants filed an affidavit in support of the motion to set aside the judgment, and in it he stated no facts showing a meritorious defense. The following affidavit was also filed:

J. W. Bunn, being duly sworn, says that he is attorney for the defendants in the above entitled action; that the said defendants have a good and meritorious defense to the cause of action alleged in the complaint, as follows:

The plaintiffs failed to comply with the terms of the contract, which is set forth in the complaint, in that they delivered to the defendants only about twenty-five hundred pounds of tobacco when, according to the defendants' construction of the contract, the quantity of tobacco should have been three thousand pounds; that the tobacco, as delivered to the defendants, was in such damaged condition as to greatly decrease its value, and that it did not measure up in quality and condition to what it was at the time it was purchased by the defendants from the plaintiffs. That, taking into consideration the quantity of tobacco and the condition at the time of its delivery by plaintiffs to the defendants, the defendants are indebted to plaintiffs in the sum of about one hundred and eighteen dollars ($118), which sum has been tendered by the defendants to the plaintiffs, and the plaintiffs refused to accept same in payment of the balance due them under the terms of the contract.

J. W. BUNN.

Subscribed and sworn to before me, this 19 June, 1919.

VITRUVIUS ROYSTER,
Clerk Superior Court.

There were other affidavits filed on the question of excusable neglect. The motion was denied, and the defendants appealed.

J. G. Mills and Douglass & Douglass attorneys for plaintiffs.
J. W. Bunn and Murray Allen attorneys for defendants.

ALLEN, J. The complaint, which is verified, alleges an express promise to pay a definite sum of money, and under the authorities it was not irregular to enter judgment in favor of the plaintiffs by default final upon failure to answer. *Hartman v. Farrior,* 95 N. C., 177; *Miller v. Smith,* 169 N. C., 210.

It is also equally well settled that a judgment by default will not be set aside unless *facts* are alleged which, if true, would establish a defense.

"The court having jurisdiction of the subject and the parties, there is a presumption in favor of its judgment, and the burden of overcoming this presumption is with the party seeking to set aside the judgment. He must set forth facts showing *prima facie* a valid defense, and the validity of the defense is for the court and not with the party. Although there was irregularity in entering the judgment, yet unless the Court can now see reasonably that defendants had a good defense, or that they could not make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside now and then be called upon soon thereafter to render just such another between the same parties? To avoid this, the law requires that a *prima facie* valid defense must be set forth." *Jeffries v. Aaron,* 120 N. C., 169, approved in *Miller v. Smith,* 169 N. C., and in other cases.

Counsel do not contest the correctness of these principles, and they further admit that no defense has been shown unless the contract sued on required the plaintiffs to deliver three thousand pounds of tobacco, which has not been done.

The determination of the appeal turns then on the construction of the contract, which is a question of law for the Court (*Young v. L. Co.,* 147 N. C., 26), and in the effort to ascertain the intent of the parties, which is the purpose of all construction, we must deal with the contract as an entirety.

"In Paige on Contracts, sec. 1112, we find it stated: 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean but what the contract means when considered as a whole.'" *R. R. v. R. R.,* 147 N. C., 382.

Following this principle and looking at the whole contract and not at separate parts, it seems to us clear that the plaintiffs sold their entire crop of tobacco, and that the defendants agreed to pay $1,000 if it weighed 3,000 pounds, but if less, only $900.

Provision is made for the payment of $600 "when tips is delivered," $300 "when the next load," "and then $100 when the last is delivered, if there is 3,000 pounds."

If this is not what the parties intended they have made a contract for the sale of a crop of tobacco, making no provision for the purchase price if it should not weigh 3,000 pounds, leaving the defendants in that event to pay nothing or upon a *quantum valebat,* which is contrary to the presumption that a written contract covers the different contingencies that may arise as far as they can be reasonably foreseen.

We are therefore of opinion no defense has been shown and that the motion was properly denied.

The allegations as to damage to the tobacco contained in the affidavit are too indefinite, and do not show that the plaintiffs are in any way responsible, and, besides, these allegations are in the affidavit of the attorney, who could only speak by hearsay, and not in the affidavit of either of the defendants.

Affirmed.

SOUTHERN RAILWAY COMPANY v. W. A. SIMPKINS COMPANY ET ALS.

(Filed 15 October, 1919.)

1. **Principal and Agent—Mortgages—Mortgagor and Mortgagee.**

Where the mortgagor and mortgagee of personalty agree that the former, in possession of the mortgaged property, shall dispose of the same in the ordinary course of trade, he is the agent of the mortgagee to the extent that he may pass the title to the goods sold in the usual way, freed from the mortgage lien, which implies authority to use the necessary means to that end.

2. **Same—Undisclosed Principal—Banks and Banking—Carriers of Goods.**

The cashier of a bank, as such, was the mortgagee of a certain lot of cotton seed, under a mortgage duly registered, which the mortgagor with his consent shipped "order, notify," and from whom the carrier took the shipment dealing with him alone as the person responsible for the freight, charging the amount to him and using a freight bill marked "freight prepaid." The bank took the draft, with bill of lading attached, for collection, collected the amount, crediting so much as was necessary to the mortgage debt, and placed the surplus, more than sufficient to pay the freight, to the mortgagor's credit, and after that had dealings with the mortgagor out of which it could have protected itself in the payment of the freight bill. For nearly three years no claim was presented to the bank by the carrier, and then the carrier sought to hold the bank liable as an undisclosed principal, when for the first time the bank had notice or knowledge of such claim: *Held*, neither the cashier nor the bank could be held, under the circumstances, as the undisclosed principal; and were it otherwise, the carrier is estopped in equity by its conduct and delay to enforce such claim.

3. **Carriers of Goods—Banks and Banking—Collection—Bills of Lading—Title—Ownership—Freight Charges—Railroads.**

Where a carrier deals with the mortgagor of goods, under a duly registered mortgage for their transportation, and looks alone to him for the freight charges thereon, and issues its bill of lading marked "freight prepaid," the title to the goods does not pass to the bank by reason of its taking the draft, bill of lading attached, for collection, and it may not be held liable for the freight charges as owner thereof.

4. **Equity — Estoppel — Carriers of Goods — Freight Charges—Banks and Banking.**

Where a mortgagee bank takes a draft, bill of lading attached, the latter marked "freight prepaid," for collection, and afterwards makes settlement with its mortgagor, from the proceeds, with a sufficient surplus to pay the freight, relying upon the carrier's statement in the bill of lading, and without knowledge that it was not true, the carrier by its silence is estopped in equity to hold the bank responsible for the freight charges.

APPEAL by plaintiff from *Allen, J.*, at May Term, 1919, of WAKE.

This is a suit brought by the plaintiff to recover the freight charges on seven cars of cotton seed shipped from Raleigh, N. C., in interstate commerce, in the name of W. A. Simpkins Company, three cars being shipped 18 October, 1912, to W. A. Simpkins Company, order notify J. P. Savant, New Orleans, La., and three cars being shipped 31 October, to the same order, notify, and the same consignee, and one car being shipped 24 October by W. A. Simpkins Company to itself, order notify Frierson Company, Limited, Frierson, La. The complaint sets forth three causes of action: (1) being that W. B. Drake, Jr., cashier, by virtue of a chattel mortgage not yet due, as mortgagee, consenting, was liable for the shipping out and the turning into money by the mortgagor; (2) that the arrangements between the W. A. Simpkins Company and the Merchants National Bank and W. B. Drake, Jr., cashier, was such as to constitute a partnership, and (3) that the assignment of the draft and bill of lading before these shipments left Raleigh to W. B. Drake, Jr., cashier for the Merchants National Bank, made them liable for the freight charges as assignee of the bill of lading.

There is no dispute as to the amount of the freight charges and the chattel mortgage on 26,000 bushels of cotton seed, the same reciting a $10,000 indebtedness due 30 November, 1912 (four to seven weeks after the shipment took place), was introduced.

This mortgage was to Drake, cashier, and was executed in July, 1912, and was registered.

In October, 1912, W. A. Simpkins Company made seven shipments of cotton seed over the Southern Railroad to Southern points. The custom which had existed between the said shipper and railroad for six or seven years was that the railroad charged the freight and "in ten days, two weeks or thirty days collection was made. The Simpkins Company had a line of credit with the railroad at the time these shipments were made." Referring to the B.L. it will be seen that the same had been marked "Prepaid" before the seed left Raleigh. Plaintiff's witness states *"that although the bill of lading was marked 'Freight Prepaid' it had not been prepaid but credit had been extended to the Simpkins Company by the railroad and is still due the railroad."*

Sight drafts were drawn on Savant and others, with bills of lading attached, and the defendant bank collected the drafts, in the usual course, and placed the proceeds to the credit of the Simpkins Company, and this company, by its checks on said bank, from time to time, drew out said funds, paying its debts and paying in part a mortgage debt to the bank.

The collections from the drafts amounted to about $6,000, of which $4,000 was retained by the bank on debts due by the Simpkins Company and the remainder paid out on its check.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and plaintiff excepted and appealed.

A. B. Andrews and W. B. Snow attorneys for plaintiff.
Robert W. Winston and J. C. Biggs attorneys for defendant.

ALLEN, J. The plaintiff's counsel admit that there is no evidence of a partnership between the Simpkins Company and either of the defendants, and this cause of action is abandoned.

They, however, insist that the defendants are liable for the freight upon two grounds:

1. That the Simpkins Company was the agent of Drake, cashier, in making the contract of shipment, and that Drake is liable on the contract as an undisclosed principal.

2. That the defendant bank, having taken an assignment of drafts with bills of lading attached, and having collected the money thereon, is liable for the freight as the owner of the property.

There is no evidence of agency except such as arises from the relation of mortgagor and mortgagee, and while the mortgagor, left in possession of goods which, in the contemplation of the parties, are to be disposed of by the mortgagor in the ordinary course of trade, is the agent of the mortgagee to the extent that he may pass the title to the goods, sold in the usual way, to a purchaser, freed of the mortgage lien (*Bynum v. Miller,* 89 N. C., 393), which carries with it "the implied authority to use the necessary and proper means to that end" (*Etheridge v. Hilliard,* 100 N. C., 253), the plaintiff is not in a position to take advantage of this principle.

In the first place, if we assume that Drake is an undisclosed principal, and as such ordinarily liable on the contract of the agent, there is no evidence that either of the defendants had any notice that there was anything due for freight, and, on the contrary, the plaintiff marked the bills of lading "freight prepaid," credit was given solely to the agent; the defendants afterwards, without objection by the plaintiff, settled with Simpkins & Co., paying out on its check from the proceeds of the draft more than enough to pay the freight, and the plaintiff waited nearly three years before making any demand on the defendants, during which time the defendants had numerous opportunities to reimburse themselves, if liable for the freight.

"The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in *Heald v. Kenworthy,* 10 Exch., 739, to the effect that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is *Davison v. Donaldson,* L. R. 9 Q. B. Div., 623.

But, as is shown in *Armstrong v. Stokes,* L. R. 7 Q. B. 599, the version of *Heald v. Kenworthy,* while a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent, relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. This case decides that the principal is not liable when the seller has dealt with the agent, supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See, also, *Irvine v. Watson,* L. R. 5, Q. B. Div., 102.

Under such circumstances it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In that case the court was dealing with a contract made by an agent which was within the scope of the authority conferred on him, but which was nevertheless made by the agent as though he were acting for himself as principal. *Fradley v. Hyland,* 2 L. R. A., 750.

The same principle is stated in 31 Cyc., 1580, as follows: "An undisclosed principal may be relieved from liability by reason of a changed state of accounts between him and the agent, the rule being formerly laid down in England, and now very generally followed in the United States, that where the principal, acting in good faith, has settled with the agent so that he would be subjected to loss were he compelled to pay the third person, he is relieved of liability to the latter. This doctrine is now held in England, and in a few cases in the United States, to be too broad, and in these jurisdictions the better rule is stated to be that the principal is discharged only where he has been induced to believe that such person has settled with the agent or has elected to hold the latter. In any event, the principal is relieved from liability where he has been induced by the conduct of the third person to settle with the agent." And in *Taintor v. Prendergast* (N. Y.), 38 A. D., 619: "It may be admitted, as was urged in the argument, that whether the principal be considered a foreigner or not, his agent, omitting to disclose his name, would be personally liable to an action. Even in case of a foreign principal, however, I apprehend it would be too strong to say that when discovered he would not be liable for the price of the commodity purchased by his agent. This may indeed be said, when a clear intent is shown to give an exclusive credit to the agent."

And the same result would follow if Drake is a disclosed principal on the facts in this record.

He has no relation to the transaction except as mortgagee, and his mortgage was registered, which was notice to the plaintiff; the contract was made with the Simpkins Company as principal, not as agent; the Simpkins Company had property rights in the cotton seed; credit was given exclusively to the Simpkins Company, and the bills of lading were marked "freight prepaid," pursuant to the contract between the plaintiff and the Simpkins Company.

The editor in the note to *Fradley v. Hyland, supra,* cites numerous authorities in support of the proposition that "Where a third party, knowing that the agent acts for his principal, elects at the time of the making of the contract to give exclusive credit to the agent, he cannot afterwards sue the principal." And in 31 Cyc., 1570, the author says: "A person who, upon entering into contractural relations with an agent, has full knowledge of the principal, but extends credit to the agent exclusively, cannot thereafter resort to the principal, and the latter is not bound, although the agent acted in the course of his employment and for the principal's benefit."

We are therefore of opinion the plaintiff cannot recover on the ground of agency, and its cause of action against the bank as the owner of the property is equally without foundation as the undisputed evidence is that the bank took the drafts with bills of lading attached for collection, and in such case no title passes. 3 R. C. L., 633; *Packing Co. v. Davis,* 118 N. C., 553.

The plaintiff does not seek to recover against the bank as assignee of the bill of lading under the authority of *Finch v. Gregg,* 126 N. C., 176, recognizing that it has been overruled by *Mason v. Cotton Co.,* 148 N. C., 495.

Again every element of an equitable estoppel is present in this case which "arises when any one, by his acts, representations or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Boddie v. Bond,* 154 N. C., 365, or as stated in different language in *Mason v. Williams,* 66 N. C., 571, quoting from *Burnwell, B.,* in *Cornish v. Abingdon,* 4 Hurl. & Nor., 549, and approved in *Redman v. Graham,* 80 N. C., 235: "The rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."

The plaintiff represented to the defendants that the freight had been paid, and relying on this representation, and without knowledge that it was not true, the defendants, having in hand more than enough money to pay the freight, turned it over to the Simpkins Company, and thereafter, during numerous dealings between the Simpkins Company and the defendants, when there was the opportunity for indemnity, the plaintiff remained silent and did not notify the defendants that the freight had not been paid, and made no demand for the freight for near three years.

Under these circumstances the plaintiff ought not to be permitted to assert its claims, if there was liability on the part of the defendants originally.

Affirmed.

R. L. SORRELL v. J. C. MCGHEE AND R. L. MCGHEE, ADMINISTRATORS.

(Filed 15 October, 1919.)

1. **Evidence—Deceased Persons—Transactions and Communications—Executors and Administrators—"Against Interest"—Statutes.**

   In an action upon an account with the deceased, against his son and administrator, the plaintiff introduced his ledger, kept in his own handwriting, showing the balance claimed to be due, and offered to show by the defendant that both the defendant and his intestate knew in the latter's lifetime of this balance shown on the ledger to be due; that then the defendant made a partial payment thereon and promised to return and get a statement of the account, which he failed to do: *Held*, this evidence, offered through the defendant, was against his interest, and not incompetent under the statute, and its exclusion was reversible error. *Bunn v. Todd*, 107 N. C., 266, cited and applied.

2. **Same—"Open Door."**

   Where the defendant, administrator of the deceased, is put upon the stand by the plaintiff and forced to testify against his interest in an action upon an account with the deceased, the admission of this testimony is not objectionable on the ground that it would open the door to other and incompetent transactions and communications with a deceased person, prohibited by the statute, this being the result only when the defendant has voluntarily testified in his own interest.

3. **Evidence—Deceased Persons—Transactions and Communications—Interest of Witness.**

   A tenant of a deceased person who has settled with the deceased for goods bought by the former on the latter's account, who is not sought to be held liable in the plaintiff's action against the administrator of the deceased, is not interested in the event of the action, and is not prohibited by the statute as to communications or transactions with a deceased person, from testifying to the sale and delivery of the goods set out in the statement of the account sued on, and the exclusion of such testimony is of material evidence and constitutes reversible error.

APPEAL by plaintiff from *Allen, J.*, at May Term, 1919, of WAKE.

This is an action to recover $54.66 alleged to be due by account for goods sold and delivered, commenced before a justice of the peace, and heard on appeal in the Superior Court.

The plaintiff introduced evidence showing that he was a farmer and also had a gin and store, and he produced upon the trial his account book or ledger in which he kept the account against the intestate of the defendants in his own handwriting. This book was excluded upon the trial.

There are several exceptions to the exclusion of evidence which will be referred to in the opinion.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

W. G. Briggs attorney for plaintiff.

R. N. Simms attorney for defendants.

ALLEN, J. In *Bunn v. Todd,* 107 N. C., 266, the present Chief Justice gives an accurate and valuable analysis of section 1631 of the Revisal, as follows:

It disqualifies—Whom:

1. Parties to the action.
2. Persons interested in the event of the action.
3. Persons through or under whom the persons in the first two classes derive their title or interest.

A witness belonging to one of these three classes is incompetent only in the following cases:

When.—To testify in behalf of himself, or the person succeeding to his title or interest, against the representative of a deceased person or committee of a lunatic, or any one deriving his title or interest through them.

And the disqualification of such person, and in such instances, is restricted to the following:

Subject-matter.—A personal transaction or communication between the witness and the person since deceased or lunatic.

And even in those cases there are the following

Exceptions.—When the representative of or person claiming through or under the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction.

This is a guide and standard for determining the competency of evidence under this section, and when properly applied, we are of opinion error has been committed in the exclusion of evidence, which entitles the plaintiff to a new trial.

The plaintiff offered evidence tending to prove that he kept his account against the intestate of the defendant in a book at his store, and he then called one of the administrators and a son of the intestate and he offered "to show by the witness, who is a defendant in this action, that in the lifetime of his father, and a short time before his death, the witness went to the store of the plaintiff for his said father and made a part payment on this specific account in this particular ledger, taking a written receipt therefor from plaintiff, and then and there setting a day when he would return and get a statement of the amount of balance his said father owed, but never did so; and further, to show that this account was known by the witness and the deceased to exist and to be due the plaintiff."

This evidence was excluded, and plaintiff excepted.

The witness is a party but he was testifying against his own interest and not in his own behalf, and he is therefore not excluded by the statute.

"In *Tredwell v. Graham, supra,* it was said that, 'Notwithstanding the statute, a party may be called to testify touching a transaction of the opposite party when it is against his own interest.' In *Weinstein v. Patrick,* 75 N. C., 344, *Justice Reade* said that 'It would seem that there could be no objection against allowing a witness to testify against his own interest.' It is not within the spirit or letter of the statute, as his own interest is supposed to be a sufficient protection for the opposite party against false or fabricated testimony. This appears to be well settled by the cases." *Seals v. Seals,* 165 N. C., 412.

The apprehension of the defendant that if we permit a plaintiff to call an administrator as a witness it will open the door to testimony of the plaintiff, which would otherwise be incompetent, is groundless, as this result only follows when the administrator is a voluntary witness testifying in his own behalf and not when he is forced upon the witness stand to testify against his interest.

The plaintiff also introduced Eli Thompson and offered to prove by him that he was a tenant of the intestate during the years 1916 and 1917 and lived on the farm with him; that the intestate furnished him from the store of the plaintiff, and offered to show the sale and delivery by the plaintiff to the witness of articles of merchandise which were charged in the account against the defendant.

This was objected to, and the plaintiff excepted.

The witness stated, without objection, that he had settled in full with the intestate for all he owed him.

This witness is not a party to the action, and as the record now stands he is not interested in the event of the action, as it does not appear that the plaintiff has any charge against him or holds him in any way responsible for any part of the account.

The evidence was material, and we see no reason for its exclusion as the witness does not come within any of the prohibitions of the statute.

These errors are material, and a new trial is therefore ordered.

Reversed.

D. K. FUTCH v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 October, 1919.)

1. **Carriers of Goods—Placing of Cars—Understanding of Agent—Instructions—Railroads.**

   Where damages are sought to be recovered for the omission or neglect by the carrier to place a refrigerator car for a shipment of lettuce at a certain place and time upon the request of the consignor's agent, and the evidence tends to show that the request was made under such circumstances that the defendant's agent, exercising reasonable intelligence and care, may have misunderstood it, an instruction based upon the understanding of the order by the agent of the defendant is not objectionable on the plaintiff's appeal.

2. **Carriers of Goods—Placing of Cars—Rules—Waiver—Railroads.**

   The carrier is entitled to reasonable notice from the shipper for placing a car to be loaded, and when written notice is required by its rules, the rule may be waived or abandoned by a verbal agreement.

3. **Instructions—Full or Explicit—Appeal and Error—Exceptions.**

   Requests for special instructions should be tendered, and when not covered by the charge, in the absence of such request, an exception that the instruction given was not full and explicit will not ordinarily be held as error on appeal.

4. **Instructions — Contentions — Appeal and Error—Objections and Exceptions.**

   The appellant should have asked the trial judge, at the time, to state such of his contentions as he claims were omitted, and having failed to do so, his exceptions on that ground will not avail him in this Court on appeal.

ACTION for damages tried before *Calvert, J.*, at April Term, 1919, of NEW HANOVER.

Judgment for defendant. Plaintiff appealed.

E. K. Bryan for plaintiff.
Rountree & Davis for defendant.

WALKER, J. The grievance alleged by the plaintiff is that the defendant failed to place a refrigerating car for him at Wrightsboro by 2:30 o'clock p. m. on 16 May, 1918, to receive a certain lot of lettuce which he had cut for shipment, as it had promised the day before to do. The evidence was conflicting, and we think it was submitted to the jury under proper instructions from the court.

The plaintiff specially complains of the judge's instruction to the jury, that if the order for the three cars, two for the Wilmington Truckers' Association *and one for the plaintiff*, was given by Freeman *and understood by the defendant's agent* they should answer the first issue "Yes" or in favor of the plaintiff, or if the next morning, 16 May, the car not having arrived, defendant's agent promised to have it at Wrightsboro by 2:30 o'clock in the afternoon, they should answer the issue in the same way. The particular objection is to the use of the words "and understood by the defendant's agent," the contention being that it made no difference whether the agent understood the terms of the order if it was in fact given. This may or may not be so. The word "understood" was manifestly not used in any such sense, that is, whether he was intelligent enough to understand it, but its meaning is whether it was understandingly given by Freeman. Freeman, plaintiff's own witness, had testified that the agent may not have "understood" that he ordered the third car for Futch, as he gave the number of cars with his fingers, raising two first and then the one. He further testified: "After I got home in the afternoon of 15 May I told Mr. Moore that I thought perhaps the clerk did not understand me, and that I had phoned down to the office and it was closed. I told them this in Mr. Elliott's office when I went down there with Mr. Futch; that after I left there I began to think about it and remember the surroundings and what was taking place down there at the office at the time; I was not positive in my mind whether the young man who took the order understood me or not so I phoned back to the office to find out, but the office was closed. That was after 6 o'clock." The judge only submitted this evidence to the jury that they might say whether the order was so given as to cause a prudent man to mistake it. That was all he meant. It was a question of fact, and the jury settled it.

Whether a new promise was made on the 16th to place the car by 2:30 p. m. was another question of fact, and the judge sufficiently stated it to the jury. The car ordered at 9 o'clock on 16 May was placed in the first train out that day. It was contended by the defendant before us that to have given a special or quicker service by using an extra engine would have been a discrimination, which is forbidden by the Interstate Commerce Act, this being an interstate shipment, moving from Wrightsboro, N. C., to Buffalo, N. Y., and *C. and A. R. R. v. Kirby,* 225 U. S., 155, was cited to support the position. But we need not consider it as the jury have decided the facts against the plaintiff. We have considered the question of discrimination and rebates at this term in *Edenton Cotton Mills v. N. S. R. R.*

The judge stated and explained fully, and if not, sufficiently, as we think, the question whether the defendant had abandoned its rule or regulation that it should have twenty-four hours written notice when a car is ordered. After stating that a railroad company may adopt reasonable regulations for placing a car under an order, the Court said that the regulation might be waived, orally, by a promise or agreement to place the car at an earlier time. This exception is not open to the plaintiff, as he asked for no special instruction concerning it, and without one the instruction was sufficient. If plaintiff desired more to be said he should have requested it. We said in *Alexander v. Cedar Works,* 177 N. C., 137, 149: "If the instructions of the court to the jury were not sufficiently full and explicit, or plaintiffs desired any particular phase of the case to be stated, they should have submitted a special request for what they wanted," citing *Simmons v. Davenport,* 140 N. C., 407; *Potato Co. v. Jeanette,* 174 N. C., 237. And in *Power Co. v. Power Co.,* 175 N. C., 668, 680, we said that if a party deems the charge not full enough in a particular phase of the case he should ask that it be enlarged and made more definite, citing *McKinnon v. Morrison,* 104 N. C., 354; *S. v. Yellowday,* 152 N. C., 793; *Orvis v. Holt,* 173 N. C., 231. The rule is a familiar one and must be complied with. *Gay v. Mitchell,* 146 N. C., 509. The law will not permit a party to be silent when he can so easily, by asking for an instruction, bring the charge to such shape as he may consider is required by the contentions and the evidence. He must guard his own interests as the trial is progressing. But we think the jury understood the matter and that the verdict is fully warranted by the evidence. He told the jury that if upon all the circumstances revealed by the evidence they found that the company had agreed to place the car at a different time than it was required to do by its own regulation, this was a departure from its rule and an abandonment of it. *Power Co. v. Power Co., supra.*

The company is entitled to reasonable notice when a car is ordered. Elliott on Railroads, sec. 1476, and also sec. 202a; Rev., sec. 2632. If the court failed to state any of plaintiff's contentions the omission should have been called to its attention, and the judges, we are sure, will always correct any error in this respect. *Mfg. Co. v. Building Co.,* 177 N. C., 103; *Jeffress v. R. R.,* 158 N. C., 215; *Alexander v. Cedar Works, supra.*

We have considered the plaintiff's exceptions with some detail because they were argued with zeal by counsel, but the case really was reduced to a very few questions of fact, which the jury decided for the defendant after a fair contest in an open field.

No error.

J. W. SEARS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 October, 1919.)

1. **Instructions — Contentions — Appeal and Error—Objections and Exceptions.**

   Objection that the trial judge stated the contentions of the adverse party more fully than those of the appellant to his prejudice should be made at the time by calling the attention of the judge to the omissions claimed that he had made, and comes too late after verdict.

2. **Instructions—Requests—Additional Instructions—Appeal and Error.**

   Other instructions than those given by the trial judge should be especially requested, and exceptions taken to their refusal to be available on appeal.

3. **Instructions—Inadequacy—Statutes.**

   Exceptions in this case that the charge of the trial judge was inadequate, and not in compliance with Rev., sec. 535, are not only untenable but too general. *Blake v. Smith,* 163 N. C., 274, cited and distinguished.

ACTION for damage tried before *Calvert, J.,* and a jury, at March Term, 1919, of PENDER.

The plaintiff alleged that he had recently been married; that he had been for a short while at the seashore with his bride, and started on his first trip to visit his parents after the marriage; that he arrived a little late at the station in Wilmington, N. C., but in time to get his ticket and to get on the train; that his wife had gotten on and that he was getting on, with suitcases and other impedimenta in his hands, when the conductor abused him and pushed him off the train, and he fell upon the ground and was injured; that he was left behind, and suffered excruciating mental agony for fear his wife should be grieved at his failure to accompany her. He admitted that his people met her at the proper station, Watha, N. C., with a conveyance and took her out home. He says that it cost him $1.50 for hotel accommodation, and that he went home the next morning. The conductor told him that he was on the wrong train and shoved him off rudely.

The defendant denied these allegations, and especially denied that the conductor or any other employee of the defendant used abusive language to the plaintiff and pushed him off the train.

Both sides offered evidence, which appears in full in the record. Issues were submitted to the jury, and the jury answered in favor of the plaintiff, and assessed his damages at $500. Counsel for defendant moved to set aside the verdict upon the ground that the damages were grossly excessive, which was denied. Counsel then moved for a new trial for error in the charge. The record discloses that both sides offered considerable testimony in support of their respective contentions. Plaintiff's counsel argued strongly, persuasively and successfully, as defendant alleges, but this he had a right to do, and it was his duty, in loyalty to his client, that it should be done. It is not contended that he exceeded the limit of fair and legitimate debate. Defendant's counsel urged that plaintiff's statement of the facts was unreasonable; that unless there was some animus on the part of the employees against him they could not, and would not, have shoved him off the car, especially if he had gotten on it; that the transaction had occurred several years previously and that plaintiff had forgotten the details; that the truth is that plaintiff, as he himself admits, had arrived late and had to go to the baggage room to get his luggage, which had been brought up from the beach, and that if his story had been true his wife, who was also called as a witness, would have testified to the act of violence. Defendant also argued that it had called both the conductor and the flagman of the train, which plaintiff alleges he took, and both of them denied plaintiff's statement. Defendant further argued that Miss Newton was a friend and neighbor of the plaintiff; that she had seen the plaintiff the morning after he had gotten left, and that she ought to be believed when she stated that the plaintiff had told her the next day that the reason he had gotten left was that he was late and had to go to the baggage room for his luggage, and that the burden of proof was upon the plaintiff and that it had not been sustained.

There was a verdict for plaintiff, as above stated, and judgment. Defendant appealed.

C. E. McMullen for plaintiff.
Rountree & Davis for defendant.

WALKER, J., after stating the case: It is assigned as error that the court did not summarize the defendant's contentions but stated the plaintiff's rather fully, and that the court laid special stress upon the issue as to damages, which led the jury to believe that there should be a recovery. We state the exceptions in defendant's own words, as they appear in its brief:

"The defendant assigns as error the charge of the court, and particularly the following:

"'On the other hand, the defendant contends that you cannot so find from the evidence and by the greater weight of it. The defendant contends that you should find from the evidence that the plaintiff and his wife were late and that he put his wife on board the train and then went back to get tickets and baggage, and that before he returned to the train that the train had left.'

"The defendant submits that this charge of the court is inadequate and not in compliance with the statute, section 535, which is as follows:

" 'He shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.'

"The only question in the case then is whether the charge of the court is sufficient, under Rev., sec. 535, the last clause of which reads:

" 'But he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.'

"We insist that there was an utter failure of the court to comply with that provision of the statute."

We are not persuaded that the criticism of the charge in the respect indicated is justified, but if it is, we have held repeatedly that such objections must be taken promptly or at the proper time, so that the judge may have opportunity to make the needed correction, if he had misstated the contention of either party. In the absence of any such action on the part of the appellant at the trial we must assume that it was satisfied with what the judge had done. *Mfg. Co. v. Building Co.,* 177 N. C., 103; *Alexander v. Cedar Works, id.,* 138.

But we do not think that in this case the statement of the plaintiff's contentions and the statement of the defendant's were so unequal as to bring the case within the principle of *Jarrett v. Trunk Co.,* 144 N. C., 299, and *Lea v. Utilities Co.,* 176 N. C., 511, 514. The defendant's contentions were sufficiently stated, so far as appears, and especially is this true in the absence of any suggestion at the time from the defendant that it was not so. We have no doubt that if the matter had been brought to the judge's attention he would have added any other contention of defendant which had been inadvertently omitted. The invariable rule is that if other instructions than those given are desired there must be a special request for them. *Simmons v. Davenport,* 140 N. C., 407; *Davis v. Keen,* 142 N. C., at p. 502; *Ives v. R. R.,* 142 N. C., 131; *Turrentine v. Wilmington,* 136 N. C., 313; *S. v. Kinsauls,* 126 N. C., 1097. We said in *Davis v. Keen, supra:* "Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances and, after availing himself of the chance to win a verdict, raise an objection afterward. He is too late. His silence will be adjudged a waiver of his right to object." The defendant did not ask for any additional statement of its contentions, but elected to abide by the one made by the court, and there was no complaint until the verdict had been returned. This is too late. Silence seems to give consent. The case of *Blake v. Smith,* 163 N. C., 274, is not an authority in favor of defendant's position. There the judge only said to the jury, "Take the case and settle it, as between man and man." There was no attempt to instruct the jury, but it was simply leaving it to them to decide the issues "as between man and man," without any rule or principle *at all* to assist them. But in the opinion it was said by the Court: "The manner in which the judge is to state the law and evidence for the assistance of the jury must necessarily be left, to a great extent, to his sound discretion and good sense." And in *S. v. Beard,* 124 N. C., 811, the Court stated the same rule: "The manner in which the judge is to state the law and assist the jury to apply the law to the facts must be left, to a great extent, to the good sense and sound judgment of the judge." We cannot sustain the exception.

No error.

H. H. RADFORD AND WIFE v. W. P. ROSE ET ALS.

(Filed 1 October, 1919.)

1. **Wills—Interpretation—Conflicting Clauses.**

A will should be construed as a whole to effectuate the intent of the testator and to reconcile apparently conflicting provisions.

2. **Same—Estates for Life—Contingent Limitations—Children—Defeasible Fee—Grandchildren—Deferred Possession.**

A devise for life to testator's named children and to their "heirs," in the sense of children, if they have any to attain the age of twenty-one, would, alone and disconnected from other parts of the will showing a contrary intent, deprive the grandchildren of all interest under the will unless they should attain the designated age; but with further provision, should the testator's children have no "bodily heirs" the estate should go to the testator's "family," and "should they have an heir at my death not under twenty-one years of age, the said heir shall be in possession" at that age: *Held*, the law favoring an early vesting of estates, and noting among other things the expression used, "have no bodily heirs," instead of "dying without bodily heirs," will construe the testator's intent that his children take a fee simple estate defeasible upon their dying without having had children, but postponing the possession of minor children born to them until they should reach the age designated.

3. **Wills—Devise—"Loan."**

A "loan" of land to the testator's children for life, with contingent limitation over, is construed as "give or devise."

4. **Wills—Estates for Life—Heirs—Rule in Shelley's Case.**

Construed alone, a devise to the testator's child for life and then to her heirs conveys a fee under the rule in Shelley's case.

5. **Same—Limitations—Contingency—Same Line of Descent.**

A devise to the testator's daughter for life and to the testator's family, should the daughter have no children, does not carry the estate to a different line of descent upon the happening of the contingency, and *Puckett v. Morgan*, 158 N. C., 344, and *Jones v. Whichard*, 163 N. C., 244, cited and distinguished.

APPEAL by defendants from *Kerr, J.,* at April Term, 1919, of JOHNSTON.

This is an action to recover $2,900, the balance due on the purchase money of a tract of land.

The defendant admitted the indebtedness but alleged that the title to the land was defective, and the plaintiff agreed in the pleading to a cancellation of the contract of purchase if the title was not good.

The feme plaintiff, Mrs. H. H. Radford, derived her title under the will of her father, Henry C. Rose, the material parts of which are as follows: "Home tract of land to be equally divided by number of acres between W. D. Rose, L. T. Rose, W. P. Rose and my daughter, Mrs. H. H. Radford. I loan to them their lifetime and then to their heirs, provided they have any that have attained the age of twenty-one years, but should they, my children, have no bodily heirs, the property shall go back to the Rose family. Should they have an heir at their death not twenty-one years of age, that the said heir shall be in possession at the age of twenty-one years of its share of the estate."

His Honor held and rendered judgment accordingly, that the plaintiff's deed conveyed a title in fee to the defendant, and the defendant excepted and appealed.

Wellons & Wellons attorneys for plaintiffs.
James D. Parker attorney for defendants.

ALLEN, J. It is well at the outset to determine the true meaning and legal effect of the clause in the will "Provided they have any that have attained the age of twenty-one years."

If this is dealt with literally and without association with the other parts of the will it will operate as a limitation upon the estate devised to the children of the testator, and will deprive them of any interest in the estate of their father under the will, unless children are born who reach the age of twenty-one years.

That this was not the intent of the testator is shown by the whole scope of the will, from which it appears that his children were the primary objects of his bounty, and that the will was made for their benefit, and after the devise to them the limitation over is not if they die leaving no bodily heirs, but "should they *have* no bodily heirs," then to the Rose family, indicating a purpose for them to have the property if children were born although they did not live to be twenty-one.

The next provision of the will throws much light on the question—"Should they have an heir at their death not twenty-one years of age, that the said heir shall be in possession at the age of twenty-one years of its share of the estate."

This can only mean that if the plaintiff died leaving a child under twenty-one the child would take, but his right to possession would be postponed, which is entirely inconsistent with the construction that the estate of the plaintiff would be defeated and would go to the Rose family if she had no child to reach twenty-one.

It is the duty of the court to consider the will as a whole and to reconcile apparently conflicting provisions (*Dunn v. Hines,* 164 N. C., 113), and when this is done the proviso cannot be held to be a limitation on the estate of the plaintiff but as having the effect of postponing the right of enjoyment by the heirs, and so understood, the will should read, "I loan to them their lifetime and then to their heirs, but should they have no bodily heirs the property shall go back to the Rose family, provided heirs under the age of twenty-one shall not take possession until they reach that age."

Under this construction what estate does the plaintiff take?

"Loan," in the connection in which it is used, means the same as "give or devise" (*Smith v. Smith,* 173 N. C., 124), and a devise "to them their lifetime and then to their heirs," under all the authorities, standing alone, would pass an estate in fee under the rule in Shelley's case. *Daniel v. Harrison,* 175 N. C., 120, and cases cited.

The subsequent provision, "But should they have no bodily heirs," has however the effect of making this fee simple estate defeasible, but only upon condition that they have no bodily heirs. *Whitfield v. Garris,* 134 N. C., 24; *Maynard v. Sears,* 157 N. C., 4.

Note that the language is not "dying without bodily heirs" or "leaving no bodily heirs," but that they "*have* no bodily heirs," a condition fully met by the fact that the plaintiff has three bodily heirs, to wit, three living children.

The facts and principle involved in *Dunn v. Hines, supra,* sustain this interpretation as well as the rules of construction stated therein, as follows: "The first taker in a will is presumably the favorite of the testator. *Rowalt v. Ulrich,* 23 Pa., 388; Appeal by McFarland, 37 *ib.,* 300. And in doubtful cases the gift is to be construed so as to make it as effectual to him as possible or as the language will warrant. *Wilson v. McKeethan,* 53 *ib.,* 70. And, too, the law favors the early vesting of an estate, to the end that property may be kept in the channels of commerce. Underhill on Wills, sec. 861; *Hilliard v. Kearney,* 45 N. C., 221; *Galloway v. Carter,* 100 N. C., 111, and cases there cited."

We therefore conclude that the plaintiff took a defeasible fee under the will of her father, which became absolute upon the birth of children.

The case of *Tyson v. Sinclair,* 138 N. C., 24, is almost directly in point, except it is stronger for the plaintiff's position, in that the having bodily heirs was at the death of the first taker while here it is having no bodily heirs.

In that case the devise was to Thomas B. Tyson "during the term of his natural life, then to the lawful heirs of his body in fee simple, on failing of such lawful heirs of his body, then to his right heirs," and it was held that Thomas B. Tyson took an estate in fee as the limitation to the right heirs over did not change the course of descent, and this is true of the will before us because the plaintiff, being a Rose, if she died without having had children, her heirs and the heirs of her father, the testator, would be the Rose family.

And this fact—that the Rose family would be the heirs of the plaintiff if she had no children—marks the distinction between this case and *Puckett v. Morgan,* 158 N. C., 344, and *Jones v. Whichard,* 163 N. C., 244, both of these cases being decided upon the principle that the language of the ulterior limitation carried the estate to a different line of descent and was sufficient, when read with the other parts of the will, to show that the words "bodily heirs" were used as a description of the person and not to denote a class who were to take in succession, and therefore that the rule in Shelley's case did not apply.

Sessoms v. Sessoms, 144 N. C., 121, is also an authority for the position of the plaintiff.

Affirmed.

J. N. BRYANT v. R. R. STONE.

(Filed 22 October, 1919.)

1. **Evidence—Opinions—Subsequent Conditions.**

Where the determinative question to recover damages for defendant's negligently tying a lighter at a dock at 5 o'clock in the afternoon so that the tides during the night washed it against the dock and overturned it, to the plaintiff's damage, in the loss of timber loaded thereon, the opinion of a witness, based upon his observation on the morning of the next day, without explanation as to changes naturally brought about by the ebb and flow of the tide, is properly excluded.

2. **Evidence—Benefit—Appeal and Error—Prejudice.**

Where the appellant has received the benefit of the testimony excluded by the witness having given it without objection in his other testimony, his exception will not be sustained.

3. Same—Surmise—New Trial.

Where the negligence of the defendant depends upon its not having properly tied a lighter, loaded with plaintiff's lumber, at a dock, it having floated under the dock and overturned during the night, thereby losing some of the lumber in the water by reason of the tide, etc., testimony as to other lighters at this dock being shifted by the carrier by water at night, and turned adrift and afterwards picked up in the river, is objectionable as mere surmise and conjecture; and certainly not a ground for a new trial where the appellant could not have been prejudiced.

4. Appeal and Error—Instructions—Special Requests—Burden of Proof.

Where the issue as to whether the defendant acted as a common carrier in delivering plaintiff's lumber to a carrier by water is determinative of the action when answered in defendant's favor, and it has been so answered, the refusal of requested instructions upon another issue, directed to the burden of proof, becomes immaterial on appeal.

5. Appeal and Error—Evidence—Judgments—Objections and Exceptions.

Where the controversy depends upon the effect of the defendant's negligently tying a lighter to a dock, exception by plaintiff to the signing of the judgment is without merit, there being testimony that it was the plaintiff's duty to furnish a watchman at night, which would have tended to avoid the injury.

APPEAL by plaintiff from *Stacy, J.,* at December Term, 1918, of NEW HANOVER.

This is an action for the recovery of $405.25, being the value of certain lumber belonging to the plaintiff which was lost, as the plaintiff alleges, while in the possession of and through the negligence of the defendant.

The plaintiff was engaged in the lumber business and maintained a sawmill near the city of Wilmington. On 9 October, 1916, the plaintiff had forty-nine thousand feet of lumber placed on the wharf of the Camp Manufacturing Company on the Cape Fear River, which had been sold and consigned to R. R. Sizer & Co. of New York, and which the plaintiff intended to ship by the Clyde Line Steamer Company to its destination. With this intention he notified the defendant, who was engaged in the business of towing lumber and other materials to and from various points on the river with boats owned and operated by the defendant for hire, that he had the lumber previously mentioned loaded on the lighters at the Camp Manufacturing Company and that he desired the defendant to deliver the same to the Clyde Line Steamship Company, to be loaded upon one of their vessels, and this the defendant agreed to do for a stipulated sum.

There is a dispute between the parties as to the time of delivery to the Clyde line, plaintiff alleging that it was not to be delivered until 7 o'clock or some time thereafter during the day following the day upon which the agreement to haul the lumber was made, while the defendant contends that there was no agreement whatever as to when the lumber should be delivered to the Clyde line.

The defendant took charge of the lighter loaded with lumber on the wharf of the Camp Manufacturing Company about 5 o'clock in the afternoon of the day the agreement between the plaintiff and defendant was made, and the defendant towed the lighter to dock of the Clyde Line Steamship Company and tied the same to the dock and left it there. The lighter was left unguarded during the night and about 5 or 6 o'clock the following morning it was swung up under the dock, and turned partially over and dumped its load of lumber into the river. A part of the lumber was recovered, and this suit is brought to recover the value of the lumber which was lost, the value being based upon the price for which the plaintiff had contracted to sell the same.

There are two theories upon which the plaintiff is resting his right to recover. The first is, that the defendant, in undertaking to deliver the plaintiff's lumber to the Clyde Line Steamship Company, did so in the capacity of a common carrier, and was therefore an insurer of the goods so that it would only be necessary for the plaintiff to show the delivery of the lumber to the defendant and its subsequent loss before the defendant had made the delivery to the Clyde Line Steamship Company, under what the plaintiff alleges were the terms of the contract, in order to make out a *prima facie* case and shift the burden upon the defendant to disprove its negligence. The second theory was that if the defendant was not acting as a common carrier he was guilty of negligence in the manner in which the lighter was moored to the dock of the steamship company, and in failing to notify some of the agents of the steamship company that the lighter was moored to the dock and in leaving the lighter unguarded during the night, and that one or the other or all of these acts of negligence was the proximate cause of the loss of the lumber.

The principal differences between the plaintiff and defendant on the first position of the plaintiff was as to the terms of the contract, the defendant contending his liability ceased when he delivered the lumber at the dock of the Clyde line.

The place of delivery was subject to the tides.

During the trial the plaintiff introduced Frank Sears, who had expert knowledge, and asked him the following questions:

Q. Are you able to form an opinion satisfactory to yourself as to the reason that this lighter was washed up under the wharf by the tide and dumped its load into the river? A. Yes, sir.

The defendant objected. Objection sustained. Plaintiff excepted.

(The witness would have testified that the lighter dumped its load because it was improperly tied.)

Q. What business were you engaged in at this time? A. Lumber business.

Q. Were you employed at Chadbourn's mill? A. Yes, sir.

Q. How long have you been engaged in that business? A. About seventeen years.

Q. While you were engaged in the lumber business and employed by Mr. Chadbourn was it a part of your duty to handle lighters and load them? A. Yes, sir; I supervised it.

Q. Did you have occasion to take lighters after the same were loaded, or supervise the loading, down to the Clyde Line wharf and other wharves and tie them there? A. Yes, sir.

Q. State whether or not, in your opinion, if this lighter had been properly tied to the wharf it would have dumped its load as you have just described this lighter did.

Defendant objects. Objection sustained. Plaintiff excepted.

(Witness would have testified that it would not.)

Q. Mr. Sears, in your opinion, could that lighter have been tied to the wharf on the evening before it was sunk in such a manner that it would not have been swept under the sill the following morning, as you have testified it was, and dumped its load into the river?

Objection by defendant. Sustained. Plaintiff excepted.

(Witness would have answered yes, sir.

It could have been moored so that both ends of the lighter could come up to the guard piling, then it would have been impossible for it to have gotten under the sill. This lighter was not tied in that way.)

A witness for the defendant, one Register, was asked the following questions:

Q. State if you know whether, at or about the time we are speaking of, a great many lighters of lumber were being carried to and handled at the Clyde dock?

Objection by plaintiff. Overruled. Exception.

A. Yes, sir; great many are handled around there and some shifted by the Clyde people at different times at night. I have known them to turn lighters and barges adrift and have picked them up in the river.

Q. Do you know as a fact that it frequently occurred, at or about this time we are speaking of, that lighters which were moored to the Clyde Line docks were changed in their position or their lines interfered with?

Objection by plaintiff. Overruled. Exception.

A. Yes, sir.

The plaintiff excepted to the refusal to give the following instructions:

"The court charges you that if you find from the evidence, and by its greater weight, that at the time set out in the complaint the defendant was engaged in the business of towing lighters, hauling freight, passengers or material for hire, to and from various points on the Cape Fear River, and that in the scope of such business carried on by the defendant the defendant contracted to tow the lighter loaded with lumber belonging to the plaintiff from the wharf of the Camp Manufacturing Company, and contracted to deliver the same to the Clyde Line Steamship Company, and should further find that in pursuance of such contract the defendant, through its agent and employees, took charge of said lighter, with the lumber of the plaintiff loaded thereon, for the purpose of delivering the said lumber of the plaintiff to the Clyde Line Steamship Company, and set out to tow the said lighter loaded with lumber to the Clyde Line Steamship Company, and the jury should further find that the said lumber, or part of the same, was lost from aboard the lighter, and that the said lumber was lost, and after the defendant had taken charge of the same and set out to deliver the same to the Clyde Line Steamship Company, then the court charges you that the defendant will be responsible for the safe delivery of the lumber to the Clyde Steamship Company, according to his contract with Bryant; and that it is not necessary for the plaintiff to show or prove any specific act of negligence by the defendant by which the said lumber was lost, but the burden of proof would be upon the defendant to show that he was not negligent in transporting the said lumber upon the lighter and delivering the same to the Clyde Line Steamship Company. And the burden of proof will be upon the defendant to show that the loss of the lumber, if the jury should find that any of the lumber was lost, was not due to any negligence on the part of the defendant, as shown by the plaintiff's twentieth exception."

His Honor charged the jury on the first issue as follows:

"Upon that issue the burden rests with the plaintiff to satisfy you of that by the greater weight of the evidence. If you find as a fact from this evidence, and you are satisfied by its greater weight that the defendant was engaged in the business of a common carrier at the time, and in the capacity of a common carrier as such undertook to transport and deliver these goods to the Clyde Line Steamship Company, why it would be your duty to answer the first issue 'Yes.' On the other hand, if you should find that the relation between the parties at the time was that of employer and employee for the purpose of towing the barge to the dock and there mooring it, and the obligation of the defendant then ceased, why it would be your duty to answer the first issue 'No.' (Because if Stone undertook simply to tow the barge down to the dock and there moor it, and his liability then ceased, why he would not be considered as having undertaken to transport and deliver these goods in the capacity of a common carrier, even if he were a common carrier at the time.)"

To so much of the court's charge as appears in parenthesis above the plaintiff excepted.

And continued: "Of course, gentlemen, if it was the custom of the harbor that under a contract of this kind the liability and the duty of the man who did the towing ceased as soon as he had moored the barge, it was the custom of the owner of the lumber to then put a watchman upon it, and he neglected to do that, that custom would ripen into law and, therefore, a duty devolving upon the plaintiff. But it is a question of fact for you whether you find from this evidence that such was a rule of the port under their agreement and under the contract."

The plaintiff excepted to the last charge upon the ground that there was no evidence to support it.

The jury returned the following verdict:

1. Was the defendant engaged in the business of a common carrier, and, as such, did the defendant undertake to transport and deliver the plaintiff's lumber to the Clyde Line Steamship Company, as alleged in the complaint? Answer: "No."

2. If so, did the defendant breach its contract of carriage and delivery? Answer: ....

3. Was the plaintiff's lumber, or any part thereof, lost by the negligence of the defendant, as alleged in the complaint? Answer: "No."

4. Did the plaintiff, by his own negligence, contribute to his loss and damage, as alleged in the answer? Answer: ....

Judgment was entered in favor of the defendant, and the plaintiff appealed.

McClammy & Burgwyn attorneys for plaintiff.
Robert Ruark attorney for defendant.

ALLEN, J. There are two reasons for overruling the exceptions taken by the plaintiff to the refusal of the court to permit the witness Sears to answer the questions propounded to him:

The first is that the evidence offered had no bearing except on the issue of negligence, the determinative fact on that issue being as to the condition of the lighter when it was left at the dock of the Clyde Line on the evening of 9 October, and the witness knew nothing of the condition then but was proposing to express opinions based on what he saw on the morning of 10 October, without explanation as to the changes naturally brought about by the ebb and flow of the tide; and the second, that the plaintiff had the benefit of the evidence in answers to questions not objected to.

The purpose of the evidence was to show that the lighter was tied to the dock negligently, and that it would not have dumped its load of lumber if it had been properly tied, and the witness testified without objection: "It appeared to me that it had too much slack in the rope and the tide rising gave a chance for the lighter to swing around and one end caught under the dock." "If the lighter had been placed alongside of the piling it would be impossible for the lighter to dump its load."

We have here the fact testified to by the witness that the lighter was improperly tied, in that the rope was too slack, and his opinion that if it had been properly tied along the piling instead of with a slack rope it would not have dumped its load, which is the substance of the evidence excluded.

The evidence of the witness Register, which is the subject of exception, is objectionable because it proves nothing and furnishes the opportunity for mere surmise and conjecture, but this is a good reason for not making it a ground for a new trial unless we can see it was prejudicial, and as it appears to us it made more for the plaintiff than for the defendant.

It is true, counsel for the defendant could argue the possibility of the lines being changed during the night because lines had been changed on the dock in the past, but the earnest and skillful counsel for the plaintiff could, and doubtless did, meet this argument by showing the jury that the question was within itself an admission that the condition in which the lines were seen by Sears on the morning of the 10th was negligent, as otherwise there was no necessity for proving the possibility of a change in them the night before, and that all the evidence was that they had not been changed but were found the next morning as they were left the night before, as Sears testified the lines were too slack on the morning of the 10th, and Register, an employee of the defendant and his witness, testified that he assisted in tying the lighter on the evening of the 9th, and that the line had to be left slack on account of the rise and fall of the tide.

The instruction which his Honor refused to give was not directed to the first issue but related to the burden of proof based upon the defendant being found to be a common carrier, and is immaterial as the first issue was found in favor of the defendant.

The controversy on the first issue as presented in this record was one of fact, dependent upon the contract, and as such was fairly submitted to the jury, as shown in the part of the charge excepted to.

The last exception cannot be sustained as the witness Sears testified it was the custom for the owner to place a watchman on the lighter when it was tied to the dock.

We find no reversible error.

No error.

ARMFIELD COMPANY AND J. A. NIVEN, TRUSTEE IN BANKRUPTCY, v. C. A. SALEEBY AND T. S. SALEEBY.

(Filed 22 October, 1919.)

1. **Vendor and Purchaser—Merchandise—Sales in Bulk—Statutes—Fraud—Evidence—Prima Facie—Questions for Jury—Trials.**

   Our statute, known as the "bulk sales law," declares void a sale of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, without first complying with certain requirements therein specified as to notice, etc., and when these statutory requirements have not been met, such sales are void, and when complied with, the sale is still *prima facie* evidence of fraud against the seller's creditors, and the issue as to the fraud must be submitted to the jury, and the sale will be declared void if the verdict establishes that there was such fraud.

2. **Same—Instructions—Special Requests—Appeal and Error.**

   The sale of a large part of a stock of merchandise in bulk, within the contemplation of the "Bulk Sales Law," must be of a considerable part of the same, and 10 per cent is held insufficient to bring the sale within the intent and meaning of the statute. Where there is evidence to this effect, it is reversible error, if the court refuses a special instruction, that if they so found the facts to be, the answer to the issue should be in the defendant's favor, or fails to substantially embody the request in his charge.

3. **Courts—Recorder's Courts—Jurisdiction—Superior Courts—Contracts—Torts—Waiver—Pleadings—Amendments—New Cause of Action.**

   Where an action has been commenced before a recorder's court having concurrent jurisdiction with the Superior Court to the extent of five hundred dollars on contracts and three hundred dollars on torts, the Superior Court may permit the plaintiff to waive the tort and sue upon the contract for an amount within the five hundred dollars authorized; though the right to do so may be jurisdictional where it appears from the original complaint, liberally construed, as must be done (Rev., sec. 495), that such was the intention of the pleader, and an amendment in the Superior Court, permitting the allegation to be amplified and made more specific, is not objectionable as setting up a new cause of action.

4. **Vendor and Purchaser — Merchandise—Sales in Bulk—Indebitatus Assumpsit.**

   Where the defendant has sold his stock of merchandise, or a large part thereof, in bulk and in violation of the statute and without complying with the same as to notice, etc., a money recovery may be had of both the fraudulent seller and his purchaser for the value of the property wrongfully converted, upon the equitable principle of *indebitatus assumpsit*, if the property has been sold or cannot be reached by execution or ordinary process, the value of the property of which the seller's creditors have been deprived being an asset of the debtor, which should be fully applied in payment of the claim of creditors.

5. Parties.

Objection to the making of a new party to the action is waived, and will not be sustained when it has been done at the request of the objector.

6. Same—Trusts—Bankruptcy—Merchandise—Sales in Bulk.

A trustee in bankruptcy for the seller is a proper party to an action to set aside a sale in bulk as being contrary to the statute.

ACTION tried before *Stacy, J.*, and a Jury, at March Term, 1919, of CUMBERLAND.

The plaintiff, Armfield Company, alleged that the defendant C. A. Saleeby was indebted to them in the sum of $446.29 for goods sold and delivered, and that he, being a retail fruit dealer, had sold a large part of his stock in bulk to his codefendants, T. S. Saleeby & Co., with intent to defraud the creditors of C. A. Saleeby, and contrary to the provisions of "Bulk Sales Law."

The suit was brought first in the recorder's court, and then carried by appeal from the judgment to the Superior Court. The jurisdiction of the recorder's court is restricted to actions on contracts not exceeding in amount five hundred dollars, and actions of tort where the amount does not exceed three hundred dollars.

The facts were, so far as admitted, that C. A. Saleeby had increased his stock of goods just before and during the Christmas holidays, and among other additions to his stock he had bought 179 barrels of apples in two lots, one of 100 barrels and the other of 79 barrels, and that he had afterwards sold them in the same way, that is, in two lots of 100 barrels and 79 barrels, about the same time, from the cars. There was much evidence as to the value of the stock varying from $1,500 to $5,000, the estimates though depending somewhat, it appears, upon the times they were made. It was admitted that both lots of the apples were worth $450. The court submitted it to the jury to find whether there had been a violation of the "Bulk Sales Law" upon all the evidence as to the value of the stock, the nature of the business, and other pertinent matters. The defendants asked the court to give this instruction to the jury:

"If the jury shall find that the usual stock of goods in the store of C. A. Saleeby was from $3,000 to $5,000, then the court charges you that the sale of 100 barrels of apples of the value of about $300 is not the sale in bulk of a large part, or the whole, of the stock of merchandise of C. A. Saleeby, and you should answer the issue 'No.' This is also true as to the 79 barrels of apples."

This instruction was refused, and the defendants excepted. It was admitted that defendants had not complied with the requirements of the "Bulk Sales Law" as to giving notice, etc.

The jury returned the following verdict:

Did the defendant C. A. Saleeby sell in bulk a large part of his stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of his business, without complying with the requirements of section 964a, Pell's Revisal, as alleged in the complaint? Answer: "Yes."

Judgment and appeal.

H. W. B. Whitley for plaintiff.

W. S. O'B. Robinson, Q. K. Nimocks and Rose & Rose for defendants.

WALKER, J., after stating the case: It having appeared that the property sold by C. A. Saleeby to his codefendants was worth more than the amount of his indebtedness to the plaintiff, the court gave judgment against both defendants for $446.29, which was the amount of the debt.

The court submitted to the jury, for their determination upon the evidence, the question whether the "Bulk Sales Law" had been violated, and refused to instruct the jury as requested by the defendant. This was error. The statute forbids the sale of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, without first complying with certain requirements therein specified as to notice, etc., and if they are not observed, declares that the sale shall be void, and even if they are, such a sale is made *prima facie* evidence of fraud. Fraud on creditors is the basis of this new remedy, in the one case the fact of noncompliance with the requirements of the statute is conclusive evidence of it, and the sale is void, and in the other it is *prima facie* fraudulent, and the evidence is referred to the jury upon which they may find the fact of fraud. *Gallup v. Rozier,* 172 N. C., 283; *Pennel v. Robinson,* 164 N. C., 257. The precise questions now before us were not present in the *Gallup v. Rozier* case, which involved only the correctness of the charge, upon a different ground than the one taken in this case. The point here is whether the court should have given the instruction requested by the defendant. A sale is not forbidden by the statute unless it is of the whole or a large part of the stock, and we do not think that 10 per cent thereof constitutes a large part of this stock. There was evidence to support the prayer of defendants, for L. L. Greenwood, plaintiff's witness, testified that in ordinary times C. A. Saleeby carried a stock of goods worth $3,000 or $4,000, and consisting of groceries, fruits, dry goods, notions and the like, and there was other like evidence sufficient, at least, to justify the instruction. The stock during the approach of Christmas was increased in size and seems to have been at its maximum when the 179 barrels of apples were sold, so that the jury might well have found that the stock was worth, at that time, forty-five hundred dollars, and perhaps even more than that amount. If they had so found, and it being admitted that the apples were worth $450, it follows that they were worth only 10 per cent of the value of the stock, which in our judgment is not a large part thereof. It should be something more than that or nearer a half of the stock to come under the condemnation of the statute. No such question has been before this Court since the statute was passed, but it has been considered in the case of *Fiske Rubber Co. v. Hayes Motor Car Co.,* 199 S. W. (Ark.), 96, and the Court held that a sale of 10 per cent of the stock by an automobile agency and accessories shop was not forbidden by the statute, which was substantially like ours, as it was not a sale of a large part of the stock. The Court conceded, as we decided in *Gallup v. Rozier, supra,* that such a stock as was sold there came within the words of the statute and a sale of it, or a large part of it, would be void if the requirements were not met by the seller. The syllabus of the *Fiske Rubber Company case* is as follows, and it correctly states accurately the point decided: "A sale by an automobile agency and accessories shop of goods aggregating approximately $150 out of an accessories stock of $1,500 to its successor in the agency, when the seller was about to move the accessories stock, is not a sale in bulk requiring compliance with the Bulk Sales Law." In the course of the opinion *Judge Humphreys* says: "The sale of items such as these in respect to value and quantity was not out of the ordinary in the conduct of the retail business in which they were engaged. . . . In the instant case only a small portion of the stock was sold. The number of items and value thereof were inconsequential when compared with the amount and value of the entire stock. The number of articles sold and the value thereof were within an ordinary retail transaction. Thompson & Dalhoff were engaged in the retail business. It is manifest that the sale was not intended to impair a continuation of the Thompson & Dalhoff automobile accessory business at some other location in the city. . . . In order to constitute a fraudulent sale under the act it must appear that a material portion of the stock was sold in bulk, out of the ordinary course of trade and contrary to the regular prosecution of the business of the seller. The Chancellor found in the instant case that the sale was an ordinary retail transaction. We think the finding was supported by the weight of evidence. It certainly cannot be said that the finding was contrary to a clear preponderance of the evidence." We take it, therefore, that the court should have recognized this construction of the law and have given the instruction, at least in substance.

The defendant further contends that, as this action was originally brought in the recorder's court, the Superior Court only acquired the jurisdiction derivatively of the recorder's court, and could not amend the pleadings so as to change that jurisdiction or to enlarge it, and that it has attempted to do so by allowing the plaintiff to waive the tort arising out of the fraud, and to sue on contract. The jurisdiction conferred upon the recorder's court is limited to those cases of contract where the amount in dispute does not exceed $500, and in cases of torts, when it does not exceed $300, but within those limits the jurisdiction is quite broad and comprehensive. The Public-Local Laws of 1913, ch. 667, makes the jurisdiction of the recorder's court concurrent with that of the Superior Court (sec. 3, subsec. 2) in all civil actions, matters and proceedings founded on contract within the above limit, and the same provision is made in the case of torts; and by section 26 the procedure, with certain exceptions, is required to follow the rules and practice as set forth in chapter 12 of the Revisal of 1905, on Civil Procedure and Amendments thereto, in so far as the same may be adapted to the needs and requirements of said court, and any changes in the rules of procedure of the court are required to be published. We think the court had the power, under this act, to proceed against both defendants upon the supposition that the tort, if one was committed, had been waived, and that plaintiff had elected to sue in contract. The complaint, as originally framed, indicated clearly that this was the intention of the pleader, and we must construe it liberally. Rev., sec. 495; *Blackmore v. Winders,* 144 N. C., 215; *Brewer v. Wynne,* 154 N. C., 467; *Bank v. Warehouse Co.,* 172 N. C., 602. No one can read the complaint, with prayer for judgment, and not conclude that the plaintiff was waiving the tort and suing on the implied contract, as in *indebitatus assumpsit.* When the court allowed the amendment so as expressly to waive the tort, it did not substantially change the cause of action but simply amplified the statement so as to show more clearly and expressly what was implied or to be inferred from the complaint as already drawn. This was legitimate and proper. It was not the substitution of a new cause of action but a better pleading of the original one. *Simpson v. R. R.,* 133 N. C., 95, 98; *Pickett v. R. R.,* 153 N. C., 148; *Hockfield v. R. R.,* 150 N. C., 419; *Gadsden v. Crafts,* 175 N. C., 358. We said in the *Simpson case, supra:* "The general scope and purpose of this action, or what is sometimes called the gravamen, the grievance or injury specially complained of, were not changed by the amendment. . . . Amendments which only amplify or enlarge the statement in the original complaint are not deemed to introduce a new cause of action, and the original statement of the cause of action may be narrowed, enlarged or fortified, in varying forms, to meet the different aspects in which the pleader may anticipate its disclosure by the evidence," citing 1 Enc. Pl. & Pr., 557-562.

We have held that in cases of fraud, where the person committing it has been thereby enriched to the damage or detriment of the other and innocent party, *indebitatus assumpsit* will lie against him, upon the ground that the law implies a promise on his part to restore what he has thus gained by the transaction. The subject is discussed in Keener on Quasi Contracts, pp. 318-325. We so decided in *Sanders v. Ragan,* 172 N. C., 612, where *Justice Hoke* treats the subject, and reviews the authorities with much clearness and discrimination, and concludes as follows: "The action of *indebitatus assumpsit,* as stated, is dependent largely on equitable principles (*Mitchell v. Walker,* 30 N. C., 243), and in the absence of a special contract controlling the matter, and unless in contravention of some public policy, it will usually lie wherever one may have been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrong-doer." The third syllabus is especially pertinent to this case: "When one's property has been wrongfully converted by fraud or deceit the owner is allowed to waive the tort and sue on an implied contract in the equitable action of *indebitatus assumpsit.*" It has also been held that, in equity, where one has acquired the property of another in fraud of the rights of a third party, and has disposed of the same so that it cannot be reached by execution or ordinary process, the court may render a money judgment against the fraudulent vendee for the value of the property so fraudulently converted. *Sprinkle v. Wellborn,* 140 N. C., 163-178, and cases cited. The law simply compels the vendee, who cooperated with his fraudulent vendor, to surrender what he has unfairly and unjustly received, and of which he has deprived the vendor's creditors, it being an asset of their debtor to which they are entitled to resort for the satisfaction of their claim.

It was decided in *Whitmore v. Hyatt,* 175 N. C., 117, where the property was alleged to have been sold in violation of the "Bulk Sales Law," that the creditors could recover of the buyer the value of the goods so sold by their debtor, who was the seller, citing *Daly v. Drug Co.,* 127 Tenn., 412, and *Martin v. Ringer,* 91 S. E. (W. Va.), 386. The *Daly case* involved this very question.

The remaining objection of defendants is not one which they are in a position to set up, as the record shows that they moved to dismiss the action because J. A. Nevin, trustee in bankruptcy, had not been made a party thereto, whereupon the court found that he had theretofore been made a party as interpleader, without objection, by order of Judge Lyon, and then ordered that he come in and be allowed to join with the plaintiff in the prosecution of the action. By not objecting at first defendants waived their right to object now. A defendant cannot ask that a party be brought in, and when it is so ordered, object because he is an improper party, for when the court has done what he has asked to be done he is in no position to insist that it be undone. But the trustee was a proper party under the circumstances to prevent further litigation. He claimed the entire fund as trustee for all the creditors, including the plaintiff, while the latter claimed only his proportionate part of it. *Symons v. Reid,* 58 N. C., 327; *Vanhorn v. Duckworth,* 42 N. C., 261; *Ayers v. Wright,* 43 N. C., 229; *Kornegay & Co. v. Farmers, etc., Steamboat Co.,* 107 N. C., 115. The plaintiff is not objecting to the trustee being made a party or to his intervening. He is not claiming all of the fund but only his rateable part. The court *must* make parties in some cases, and in others it *may* add new parties. Rev., sec. 507. "It can very rarely happen," said the Chief Justice, "that making an additional party will be a serious prejudice, and hence such orders are usually discretionary, and not reviewable." *Bernard v. Shemwell,* 139 N. C., 446, citing Code, sec. 273; *Tillery v. Candler,* 118 N. C., 889. Defendants cannot be prejudiced by making the trustee a party. It is rather beneficial to them, as they will be protected from another action by him, based upon his right to recover the money for the creditors generally, the fund to be administered in the bankruptcy proceedings. We have considered all the questions as there must be a new trial, for they would be raised again.

There was error in the charge, because of which a new trial is ordered.

New trial.

BOARD OF EDUCATION OF ALAMANCE COUNTY v. BOARD OF COMMISSIONERS OF ALAMANCE COUNTY.

(Filed 22 October, 1919.)

1. **Schools—Taxation—Statutes—Constitutional Law.**

Chapter 102, Public Laws of 1919, in relation to an additional levy by the county commissioners to raise a deficiency in the amount of the budget furnished by the county board of education for the maintenance and support of schools is to be interpreted with the constitutional amendment requiring a six-months term.

2. **Same—Special Tax.**

If the levy under chapter 102, Public Laws of 1919, of 35 cents on the one hundred dollars is insufficient for "the support and maintenance" of a six-months term of school in the county, the county may receive from the "State Public School Fund" such amount as necessary for the purpose; and the provision of section 6, "that no county shall be compelled to exceed the limit of 35 cents on the hundred dollars, except as provided in section 7," refers, in the exception, to an increase of the levy permitted by the latter section, which is "not to exceed 25 per cent of the teachers' salary fund" (provided for in section 6), if the amount should then be insufficient, under section 7, after exhausting all sources from which it comes, for the purpose of defraying the expenses necessary for schools, accessories, etc., as provided by section 7.

3. **Same—Mandamus—County Commissioners—Discretion.**

Under the provisions of sec. 8, ch. 102, Laws of 1919, where the board of county education and the board of county commissioners disagree as to the amount needed for the maintenance of a six-months term of the public schools or as to the rate of taxation, or if the county commissioners refuse to levy the necessary tax, a mandamus will lie by the board of county education against the board of county commissioners, based upon the disagreement, by the express requirement of the statute.

CIVIL ACTION, heard by *Devin, J.,* in ALAMANCE Superior Court, the hearing, by consent, being adjourned to his chambers in the city of Durham, where he made the following findings of fact and rendered the following judgment:

This was a mandamus proceeding instituted by the Board of Education of Alamance County against the Board of Commissioners of said county, and was heard before the undersigned judge at chambers, at Oxford, on the 24th day of July, 1919, and at chambers, at Durham, on the 15th day of August, 1919.

No exception was taken by either side as to any matter of procedure, both plaintiff and defendant appearing with counsel. The cause was heard upon the pleadings and exhibits thereto, affidavits and oral testimony, and the court finds the following facts:

The court finds that the plaintiff board of education, in accordance with the provisions of chapter 102, Public Laws of 1919, filed with the defendant board of county commissioners, in due form properly verified, the school budget of Alamance County for the school year beginning July, 1919, and ending June 30, 1920.

The summary of the items of the budget showed the rate of tax on each one hundred dollars assessed value of property necessary for salary fund to be 40 cents, and for the building and incidental fund 10 cents, making a total levy asked of 50 cents.

At the May meeting of the board of county commissioners an order was made to levy this rate as asked, but at the meeting on the first Monday in June, 1919, this order was rescinded and there was included in the levy of the regular county taxes made on this date a levy of 35 cents on the one hundred dollars worth of property for special tax for school. In making said levy the board of county commissioners made no distinction between salary fund and that for repairs and incidental expenses.

The court finds, from the carefully prepared affidavit of M. C. Terrell and the other evidence adduced, that the teachers' salary fund necessary to be raised to pay teachers' salaries for the year will be substantially the sum stated in the budget, to wit, $54,812.

The court finds that the total assessed value of property taxable in Alamance County for the year 1919 will be $14,598,420. Therefore, the tax levy of 35 cents would produce, without allowing any deduction for insolvents and expenses of collection, $51,094. This amount will not be sufficient to pay the teachers' salaries.

The court finds that the budget correctly sets forth the amount that will necessarily be required to provide repairs and additions to school buildings and incidental expenses, all of which the court finds are necessary to carry on and maintain the schools of said county for six months.

The correctness of the items of the budget were not controverted by the defendant.

The court finds that the building fund requirement of $10,600 does not include any thing for new school buildings, but is for repairs and additions only to existing school buildings which are rendered necessary to properly house and protect the school children during the ensuing school year.

The court finds that the amount for "administration expenses" $2,182, and that the amount for "expenses of operation and maintenance," $3,049, are reasonable, proper and necessary.

The amount asked for the purpose of refunding borrowed money and for salary of superintendent of public welfare and home demonstrator are not considered necessary to maintain six-months school term, and are omitted from the findings in this case, though they should in some way be provided for.

The court finds that the amount for "city schools, buildings and expense fund," $4,283, is for repairs and additions to school property and maintenance expenses which are reasonable and proper expenditures for the housing and protection of school children and necessary to the carrying on and maintaining of a six-months school term in said county for the ensuing year.

There are other items of incidental expense necessary to correctly meet statutory requirements, but which are not included in the budget, and are therefore not considered in these findings. These necessary requirements total $20,114.

The court finds that the only "available funds" to meet these expenditures required for "building and incidental expense fund" will amount to $11,194 for the year 1919 in Alamance County, this being the total amount that will be derived from poll tax, dog tax, fines and all other sources.

It therefore appears to the court that the available funds are insufficient to provide for the incidental expenses and for necessary repairs and additions to school buildings, and that there will be a deficiency of $8,520. Considering that a reduction of $1,250 of this amount may be effected by strict economy and a reduction of estimates it follows that a certain deficiency of $7,270 will arise, and that there is no other source from which it can be met but by an additional tax levy of 5 cents on the one hundred dollars worth of taxable property, and the court finds that an additional levy of special tax of this amount is necessary in order to maintain a six-months school term in said county.

The court finds that the rate of special tax for school levied in said county, towit, 35 cents, will be insufficient to maintain schools for six months in every school district in said county as required by the Constitution, and that an additional levy of 5 cents, making the total rate 40 cents on the one hundred dollars assessed value of all taxable property in said county, will be necessary for the performance of the duty imposed by Article IX, sec. 3, of the Constitution of North Carolina.

Therefore, in accordance with provisions of chapter 102, Public Laws of 1919, sec. 8, upon motion of J. Elmer Long, attorney for plaintiff, it is adjudged that defendant board be required to levy an additional special tax for schools in said county of 5 cents on the one hundred dollars worth assessed value of all taxable property in said county.

This 21st day of August, 1919. W. A. DEVIN, *Judge.*

As the decision of the case depends upon a construction of the following sections of the School Law of the year 1919 (Public Laws of

1919, ch. 102), we set them out here for convenience, instead of in the opinion of the Court:

"Sec. 6. On or before the first Monday in May of each year the county board of education shall submit an itemized county school budget to the county commissioners, setting forth the amount of money needed to maintain the public schools of the county six months for the succeeding school year. . . . It shall then be the duty of the board of county commissioners, after deducting the amount to be received from the State Public School Fund, to levy annually a special tax on all property, real and personal, and on all taxable polls, subject to the constitutional limitation of the poll tax, in said county, sufficient to supply the deficiency shown by said budget to be needed for the support and maintenance of the public schools of said county for six months in each school district. The said tax shall be annually levied and collected at the same time and in the same manner as other county taxes are levied and collected, and the funds derived therefrom, together with other school funds in their hands, shall be apportioned and expended by the county board of education for maintaining one or more public schools in each school district for a term of six months in each year: *Provided,* that no county shall be compelled to levy a special county tax of more than thirty-five cents on every one hundred dollars valuation of property, real and personal, and a corresponding tax on every taxable poll for said purpose, except as provided in section seven of the act; and after every county shall have levied and collected the special county tax to the limit stated above, if the funds derived therefrom may be insufficient therefor, said county shall receive from the State Public School Fund an apportionment sufficient to bring the school term in every school district to six months.

"Sec. 7. All poll tax, fines, forfeitures, penalties, and all public school revenues, other than that derived from the State Public School Fund and the special county tax, shall be placed to the credit of the incidental expense fund and the building fund, as provided in the budget, and if this amount is insufficient for these funds, the county board of education may provide in the county school budget for an additional amount not to exceed twenty-five per cent of the teachers' salary fund, and the county tax may be increased sufficiently beyond the maximum levy of thirty-five cents to provide this amount if it shall appear necessary to the county board of education and the county commissioners.

"Sec. 8. In the event of a disagreement between the county board of education and the board of county commissioners as to the amount to be provided by the county for the maintenance of a six-months school term, and as to the rate of tax to be levied therefor, or in the event of the refusal of any board of county commissioners to levy said tax, the county board of education shall bring action in the nature of a mandamus against the board of county commissioners to compel the levying of such special tax in the manner and form as provided in sections eight hundred twenty-two and eight hundred twenty-four of the Revisal of one thousand nine hundred and five of North Carolina. And it shall be the duty of the judge hearing the same to find the facts as to the amount needed and the amount available from the sources herein specified, which findings shall be conclusive, and to give judgment requiring the county commissioners to levy the sum which he shall find necessary to maintain the schools for six months in every school district in said county. Any board of county commissioners failing to obey said order and to levy said tax shall be guilty of a misdemeanor and shall be prosecuted therefor in the Superior Court by the solicitor of that district."

The defendant, after excepting thereto, appealed from the judgment.

Long & Long, for plaintiff.
Parker & Long, for defendant.

WALKER J., after stating the case: It must be admitted that there is some confusion in the terms of the statute as to the limit of 35 per cent. Our view is that the dominant idea and the clear and explicitly expressed purpose was to provide sufficient funds for the support and maintenance of the public schools in the State for the new constitutional term of six months, instead of for four months which was formerly the length of the term, as fixed by the Constitution. We must so construe the law as to execute this intention.

It seems to be conceded that the levy of 35 cents on the one hundred dollars will not be sufficient to take care of teachers' salaries for a six-months term in this county. If that fund is deficient for such purpose, or for "the support and maintenance of the schools," as it is denominated in the act, the county shall receive from the "State Public School Fund" an apportionment sufficient to supply the deficiency, and provide a fund adequate "to bring the school term to six months." This would appear to be a satisfactory and complete provision for keeping that fund to the required amount.

Section 6 of the act of 1919, ch. 102, provides that no county shall be compelled to exceed the limit of 35 cents on the one hundred dollars of property, "except as provided in section 7." We think that the exception therein refers plainly to the further provision in section 7, that the "35 cents" levy may be exceeded to furnish the amount requisite to make up the deficiency in the incidental expense and the building fund mentioned in the latter section if that fund is inadequate after exhausting all sources from which it comes.

It was supposed that the support and maintenance fund had already been fully established. But the appellee's counsel contends that the limit of 35 cents cannot be exceeded, even to supply any insufficiency in the incidental expense and the building funds, until the county school authorities have applied for and received the apportionment from the State Public School Fund, which is allowed to the county by the concluding words of section 6. That provision does not take effect unless the fund raised by the tax of 35 cents is insufficient for the purpose designated by section 6. In other words, it is intended to supplement the amount so raised by the levy of 35 cents of the one hundred dollars if it falls short of what is necessary to maintain the schools for the six-months period.

This brings us to consider section 8 of the Public Law of 1919, ch. 102, which refers to any differences or disagreements which may arise between the two boards—that is, the county board of education and the board of county commissioners—with reference to the amount needed for the maintenance of a six-months school term, and also as to the rate of taxation therefor, and also what must be done in the event of the refusal of the commissioners to levy the necessary tax. In such cases, the board of education is required to bring an action for a mandamus to compel them to comply with the law and perform their duty.

The defendant contends that section 6 and section 8 refer to the salaries of teachers and the fund to be raised by the 35 cents levy, and it is only where the latter produces an insufficient fund, and there is disagreement between the two boards, that the mandamus will lie; and, further, that application should first be made for the county's apportionment from the State Public School Fund before any action can be brought. But this position is manifestly untenable, for one reason—if there are not others—that section 6 requires that the deficiency in the amount derived from the 35 cents tax shall be supplied from the State apportionment fund until a fund shall be realized which will "be sufficient to bring the school term in every district to six month."

If the amount produced by the levy of 35 cents is to be so supplemented from the State apportionment fund, as to make it adequate for a six-months term in each school district, where would there be any necessity for a mandamus?

If the 35 cents fund is to be replenished from the apportionment fund, the object of the sixth section would be fully accomplished, and no compulsory process would be needed. If the boards disagree "as to the amount to be raised under section 6, or as to the rate of the tax, or the commissioners refuse to levy the proper tax," it may be that the board of education may proceed, by an action for a mandamus, to force obedience to the requirements of that section, but it is clear—at least to us—that any delinquency on the part of the commissioners, whether it be a failure to act in any material way, under section 6 or under section 7, or a disagreement with the other board, requires the board of education to apply for a mandamus under section 8. Why not. The very same question is raised by a disagreement concerning the proper tax, or rate, under section 7 as under section 6, and it would be strange if the Legislature provided for the one case and did not do so for the other, and the taxes required to be levied under both sections—one as well as the other—was necessary in order to provide for a six-months term. The expense fund and the building fund were essentials in the same sense and in the same degree: Schools cannot be well conducted without schoolhouses and accessories, such as are mentioned in section 7.

Article XIV, sec 3, is just as mandatory in respect to "maintaining in each district one or more public schools for at least six months in every year" as any other provision of that article, and, too, it declares to be criminal a failure of the commissioners to comply with it, and subjects them to indictment. Could it possibly be made more peremptory? *Collie v. Comrs,* 145 N. C., 177.

Speaking of the imperative nature of the requirement of Article IX, sections 1, 2 and 3, as to maintaining schools, it was said, at page 184 and 185: "It is true the people have agreed to support their Government in all its branches by the method of taxation, consisting in reasonable impositions laid upon persons and property, by a standard which they deemed fair and just to all; but one of their leading desires was that their children should receive the advantages of education, so that not only should the Government proceed in the exercise of its ordinary functions for their benefit and advantage, but that the people of the State should be elevated in the scale of intelligence and prepared to enjoy the true blessings of liberty and prosperity for which the compact of government was formed, and, moreover, to further advance their welfare and happiness. This was of the first consideration. . . . If there is a deliberately conceived and carefully stated principle in the Constitution, and one which it is perfectly evident the people desired to be clearly understood and rigidly enforced, it is that embraced in sections 1, 2 and 3 of Article IX, in regard to the schooling of the children of the State. They intended that the State should no longer be debased or retarded in its progress by the ignorance of its people. It is plain that those who wrote these sections knew, as any intelligent citizen knows, that the surest way to obtain good government, and to enjoy it, is to know how to appreciate its blessings and to be able to perpetuate it by a proper and intelligent use of it. When it was, therefore, declared that the people *must* be educated, it was just as binding an injunction that the means to that end must be supplied by taxation as it was that the counties or even the State Government should be supported."

Why is one essential mandate of the Constitution any more binding, or obedience to it any more obligatory, than another? What the framers of the Constitution meant was this: That the State and county governments should be maintained by taxation (with certain qualifications), which should be laid upon a principle of equation or due proportion between property and taxes, and within a certain limit; but that, in addition to this sovereign power and corresponding duty, so necessary to the vigorous life of the Government, there should be another, which is equally vital to its continuance under just and wise laws, and that is the separate and independent right to educate the people, by taxation, also, to the extent that is might be necessary to keep open to all the children between certain ages the public schools of the State for "at least four months in every year." Section 1, of Art. IX, declares that "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged." The language of sections 2 and 3, regarding the establishment and maintenance of schools, is mandatory in form and substance. *Board of Education v. Comrs.,* 150 N. C., 116, where the question is fully considered.

But the appellant further contends, that the levying of the tax and fixing the rate is discretionary, and the board of county commissioners cannot be forced to do either by mandamus, but should be left to the free and untrammeled exercise of that discretion. The position is thus stated in the appellant's brief: "The only real question in this case is whether the levying of additional taxes to take care of the incidental expense fund and the building fund shown in the budget prepared by the county board of education is vested in the discretion of the county commissioners. The statute distinctly says that additional taxes may be levied for this fund 'if it shall appear necessary to the county board of education and the county commissioners' these words must of necessity vest the county commissioners with the power to say whether they deem this additional levy necessary. The county board of education must have thought it necessary when they made up the budget but this language of the statute vests this discretion in both boards, and each board equally."

It cannot be denied that a court will not, by its compulsory process, command an act to be done which involves the exercise of a public officer's discretion; but what that means is that it will not control the exercise of his discretion, but merely compel him to perform his plain duty by acting, but not in any particular way, for to go beyond this limit would result in taking away his discretion. High on Extr. Legal Remedies (2 Ed.), secs. 24 and 34, puts it this way: "Whenever such officers or bodies are vested with discretionary powers as to the performance of any duty required at their hands, or when in reaching a given result of official action they are necessarily obliged to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion or control or dictate the judgment or decision which shall be reached. . . An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties which are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act or may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner."

Our decisions are in perfect harmony with the doctrine as just stated. *Attorney-General v. Justices of Guilford,* 27 N. C., 315; *Broadnax v. Groom,* 64 N. C., 244; *Barnes v. Comrs.,* 135 N. C., 27; *Tate v. Comrs.,* 122 N. C., 812; *Ewbank v. Turner,* 134 N. C., 77; *Glenn v. Comrs,* 139 N. C., 412; *Loughran v. Hickory,* 129 N. C., 281; *Burton v. Furman,* 115 N. C., 166; *Board of Education v. Comrs,* 150 N. C., 116, and *Edgerton v. Kirby,* 156 N. C., 347, where we said, at p. 350: "If a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that they are to judge for themselves, and, therefore, no court can require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons to whom the discretion is confided by law would not then be their own, but that of the court under whose mandate or compulsion they acted."

Justice Bynum stated the rule with clearness in *Brown v. Turner,* 70 N. C., 93: "Mandamus will lie when the act required to be done, or imposed by law, is merely ministerial, the relater has a clear right and is without any other adequate remedy. Moses on Mandamus, 68. But it does not lie where judgment and discretion are to be exercised, nor to control the officer in the manner of conducting the general duties of the office."

If the two boards, or the commissioners, have a discretion in the matter, the rule applies, and the writ of mandamus should not have issued. But we do not see that any discretion exists, or that a case for the application of the rule can possibly arise. The appellant's counsel based his contention on the requirement in the statute (sec. 7), the words being those quoted below, that they may increase the levy sufficiently beyond the maximum of thirty-five cents, "if it shall appear necessary" to the two boards that this should be done. If the Legislature had stopped there the argument of appellant might have some force, but it does not, and expressly provides, as we think, that if they disagree as to the amount of tax that should be levied, which, of course, includes the necessity for it, or as to the rate, a writ of mandamus shall be applied for by the board of education (sec. 8). An important function of the two boards would be neglected and the intention of the Legislature would be utterly defeated under any other interpretation of the statute. We consider that the meaning of the statute is so palpable as to be entirely free from doubt.

The scheme provided for supporting the public schools in each district for a six-months term, under the mandatory provisions of the Constitution, and the requirements of the statute would prove futile, if we should decide otherwise. The language being clear and unmistakable, this cannon of interpretation applies: "When a law is plain and unambigious, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *Fisher v. Bagort,* 2 Cranch (U. S.), 399; *Abernethy v. Comrs.,* 169 N. C., 631; Sedgwick Stat. Constr., p. 231.

If we so interpret the law, the proceedings below were undoubtedly correct. *School Comrs. v. Board of Aldermen of the City of Charlotte,* 158 N. C., 191, fully sustains our view and somewhat resembles this case in respect to its facts. The paramount intention was to support and maintain schools for the term of six months, as provided by the Constitution, which was recently amended, and that taxes should be levied to accomplish that purpose.

Affirmed.

JOHNNIE P. L. E. SILLS v. FRANK BETHEA

(Filed 22 October, 1919.)

1. **Constitutional Law—Husband and Wife—Written Consent—Deeds and Conveyances—Contracts.**

   The written consent of the husband is necessary to a valid conveyance by the wife of her lands. Const., Art. X, sec. 6.

2. **Same—Death of Husband—Mortgages—Sale—Election.**

   Without the written consent of her husband, the wife attempted to convey her lands, took a mortgage back to secure the balance of the purchase price, and, after the death of her husband, advertised the land under the power of sale in the mortgage, but withdrew it after tender of principal, interest and costs by the mortgagor and brought action of ejectment, in which the defendant asked for specific performance: *Held*, having by the foreclosure proceedings elected, after the death of her husband, to receive the money for her land, she will not be permitted to claim it on the ground that her deed, without the written consent of her husband, was invalid to pass the title.

BROWN, J., concurring; WALKER, J., dissenting; HOKE, J., concurring in the dissenting opinion.

APPEAL by defendant from *Guion, J.*, at May Term, 1919, of SAMPSON.

Ejectment. The judge finds from the pleadings and admission of the parties that the plaintiff while married executed the deed for the land to the defendant, who at the same time executed notes for the purchase money secured by mortgage on the same land. After the plaintiff became discovert by the death of her husband she advertised the land for sale under the mortgage, but subsequently, when the defendant tendered her the full amount of the notes and interest, she called the sale off and brought this action for ejectment. The court rendered judgment for specific performance. Appeal by Plaintiff.

Kerr & Herring for plaintiff.
Butler & Herring, Fowler & Crumpler, and E. C. West for defendant.

CLARK, C. J. The plaintiff has gone into court asking recovery of the land, and the defendant asks a decree of specific performance.

The facts are found by the judge upon the pleadings and admissions of the parties. The privy examination of the plaintiff was duly taken, but his Honor correctly held that the deed was not sufficient as a conveyance because it lacked the "written assent of the husband." Cons., Art. X, sec. 6.

Irrespective of that defect, it was not a conveyance of any title, because at the instant of making the deed the defendant conveyed back the property by a mortgage to secure the purchase money. It was therefore, in legal effect, in no sense a "conveyance," but merely a contract to convey upon payment of the purchase money, notwithstanding that in form there was a deed from the plaintiff to the defendant and a mortgage deed back. This was held in *Bunting v. Jones,* 78 N. C., 242, and numerous citations thereto in Anno. Ed., holding that in such case "no title vested in the defendant whose wife acquired no dower or homestead rights therein." It is therefore simply a "contract" that upon payment of the purchase money the plaintiff would convey the property. It has no other legal effect.

The Martin Act, ch. 109, Laws 1911, repealed Rev., 2094, and substituted therefor the following: "Every married woman shall be authorized to contract and deal so as to affect her *real* and personal property *in the same manner and with the same effect* as *if she were unmarried,*" with the exception only of contracts with her husband under Rev., 2107; and as to *"conveyances* of her real estate" still requiring the written assent of the husband and privy examination. The *sole* exception as to *contracts* was as to contracts with her husband under Rev., 2107. *Thrash v. Ould,* 172 N. C., 730; *Grocery Co. v. Bails,* 177 N. C., 299, and cases there cited.

Further, after the death of her husband, the plaintiff recognizing fully the *obligation* of the contract endeavored to enforce it against the defendant, and advertised the property for sale under the mortgage. But when the defendant tendered her the full amount of the note and interest thereon, together with the costs of sale under the mortgage, and demanded execution of the deed for the property under the terms of the contract she refused to comply and brought this action to recover the land, and the defendant asks a decree of specific performance.

Judge Guion, after reciting in the judgment the facts above set out, as to which there was no controversy, recites, "The court being further of the opinion, while the deed set forth in the answer was invalid and ineffectual to convey said land by reason of the want of the written assent of the husband thereto, yet being of the opinion that said deed so executed was a good and sufficient contract to convey said land under the provision of Laws 1911, ch. 109," adjudges that there was a "good and sufficient contract to convey said land, and that upon payment to the plaintiff of the full sum evidenced by the notes described in the answer, with the interest thereon until paid, said plaintiff should execute to the defendant a deed for the land described in the complaint, and that the defendant recover of the plaintiff the costs of the action."

This is in exact accordance with the terms of the contract which the plaintiff under the Martin Act had the right to make "*in the same manner and with the same effect* as *if she were unmarried.*" There is exactly the same enforcement of the contract against the plaintiff which she sought to have against the defendant after she again became a single woman by advertising the property for sale under the contract.

The just and accomplished judge applied to both parties the thrice repeated scriptual injunction, "With what measure ye mete, it shall be measured to you again." (Matthew 7:2, which was repeated in Mark 4:24 and Luke 7:38.) Equity and justice know no higher standard than this. The plaintiff, her husband being dead, attempted to enforce the contract and cannot now complain that the Court has made her comply therewith.

While the husband lived the obligation of the contract could be enforced only by an action for damages (*Warren v. Dail,* 170 N. C., 406), for the reason that the court could not require specific performance because it could not compel the husband to give his written assent (*Fortune v. Watkins,* 94 N. C., 315, which was the case where the wife refused to join in the husband's deed), but the husband being dead there is no obstacle now in requiring the plaintiff to comply with her contract by specific performance.

Affirmed.

BROWN, J., concurring: After the death of her husband, when she became discovert, in my opinion, the plaintiff had the right to repudiate the transaction and sue for the land, or else to affirm the sale and collect the purchase money represented by the purchase money notes and mortgage. It is manifest that she elected to collect the purchase money and thereby affirmed the sale. When she advertised the land under the power of sale contained in the mortgage she thereby demanded the purchase money of the defendant and indicated her election to take the purchase money and not the land. This was as clear an indication of her purpose as if she had brought her suit to foreclose the mortgage and bar the defendant of his equity of redemption. It was a clear, unmistakable and unequivocal election on her part, and when the defendant tendered her the full amount of the purchase money after the land had been advertised for sale, it was her duty to accept it. As the plaintiff could not have the land and the purchase money both it was her duty, after the death of her husband, if she intended to claim the land, to cancel the purchase money notes and mortgage and return them to the defendant and make demand upon him for the land, which she failed to do.

For these reasons, I concur in the judgment of the Court.

WALKER, J., dissenting: I dissent in this case upon the ground so strongly and clearly stated in the dissenting opinion of *Justice Brown,* in *Warren v. Dail,* 170 N. C., 406, at p. 415, in which I concurred. He there says: "If any legal question has ever been settled by repeated decisions of this Court it is that the deed or contract of a married woman charging her real estate in this State is a nullity unless her husband joins and her privy examination is taken. *Scott v. Battle,* 85 N. C., 184; *Farthing v. Shields,* 106 N. C., 289; *Ball v. Paquin,* 140 N. C., 83; *Clayton v. Rose,* 87 N. C., 106; *Bank v. Benbow,* 150 N. C., 781; *Council v. Pridgen,* 153 N. C., 443. The assent of the husband is a constitutional requirement. The necessity for the privy examination is not only required by Rev., 952, as to all her lands, and by the Constitution as to the homestead, but it is made a necessary requisite by the so-called Martin Act itself. So carefully has this Court guarded this protection to married women that in *Smith v. Bruton,* 137 N. C., 79, it is held that a married woman cannot bind herself by agreeing to arbitrate the question of title to land owned by her. It might result in conveying away her land by an award of arbitrators without the necessary assent of her husband and privy examination. . . . In this case the attempt is being made to give force and vitality to a contract that has never had legal existence."

In this case there was no assent of her husband to the deed she is alleged to have made, and no valid privy examination. It was, therefore, void—an absolute nullity and incapable of ratification by anything she has since done and relied on as such. She has done nothing to prejudice any one's rights. The mere advertisement under the power contained in the mortgage is not sufficient to estop her or to bind her by ratification, admitting that the void deed is susceptible of ratification by an act of hers sufficient for that purpose. How was anybody hurt by her advertisement? She withdrew it and stood upon her rights under the law before there was even any equitable estoppel by completing the sale, making a deed and receiving the purchase money. There is no contention that any other kind of estoppel prevents her from claiming her land.

In *Bank v. Bridgers,* 98 N. C., 67, Mrs. Bridgers, whose original note was held to be void because given during her coverture, gave a new note after she become discovert, which was founded upon a fresh consideration. She was held to be bound by the second note because it was a new transaction, based upon a sufficient legal consideration.

The Martin Act, when properly considered, in my judgment, is not applicable to the facts of this case. It is conceded that the deed of this lady, who was a married woman when it was executed, is void, not having the assent of her husband, and her valid privy examination not having been taken, and yet it is proposed to hold her bound by it as a contract and to compel her to do by our decree what the law plainly and positively forbids. This is not an action for damages, but we are now dealing directly with her land, with a view of taking it from her, whether by deed or decree, without the formalities and ceremonies, which the law expressly and imperatively requires to be observed. What is forbidden to be done directly cannot be done indirectly. The anomaly thus presented was surely not contemplated by the act of 1911, and was not in the mind of its able and learned author when he formulated it. Her deed is absolutely void, and is a nullity. *Ex nihilo nihil fit.*

It is suggested that this instrument, in form and substance a deed, may operate as a contract to sell; but if this be so, and I must deny its correctness, it makes no difference in the result, because by the statute, Revisal, secs. 952 and 953, a contract to sell the wife's land without the written assent of the husband is just as void as if it is treated only as a deed. The husband and wife cannot *execute* the deed or contract by separate instruments. They must execute it jointly, and then the probate, as to both, can be taken by different officers at different times and places. But here there was no good execution, and whether treated as a deed or a contract the instrument was an absolute nullity, or, as the Court says in *Scott v. Battle, supra,* it is so utterly void that it has no more force or effect than a "blank piece of paper." I am unable to see how a paper absolutely void can be vitalized by the husband's death, without anything being thereafter done by the wife, which, in law, imparts life to it. The mere fact of the husband's death does not by any principle of law known to our jurisprudence, produce any such effect. The "Martin Act" is far from warranting the assumption that the deed of a married woman can thus be made to operate as her contract. And a majority of the Court, as I understand it, take this view, the disagreement between them being only as to whether there was a ratification.

But it is now strenuously urged that she is bound by her void deed, even as a deed, and not merely as an executory contract, because she has ratified it after her discoverture. How and why? Judge Guion took no such position when he entered judgment upon the agreed facts. He held her bound by it, not as a deed, but as a contract to convey, which fell within the operation of the Laws of 1911, ch. 109; but that view does not meet with the concurrence of a majority of this Court, and the judgment cannot be affirmed unless the *feme* is equitably estopped, by her acts or conduct, to allege the invalidity of her deed, or, for the same reason, she has ratified the same. A naked ratification or admission of her liability by words will not do, if it is oral, because as all the cases show, it would be void by the statute of frauds, and we would permit her land to pass to another in clear violation of all our statutes (*Price v. Hart,* 29 Mo., 171); and besides, it would contain no element of an equitable estoppel. *Brown v. Bennett,* Pa. St., 420.

I have examined the authorities upon this subject carefully and exhaustively and find that in every case where it was held that a married woman, who had become discovert, was bound, because of ratification, there was some element of fraud or, at least, of an estoppel, which made it inequitable that she should be allowed to disavow, or repudiate, her deed, or there was formal ratification by a binding written instrument.

It is said in *Price v. Hart, supra:* "That deed, not having been acknowledged according to law, had no validity as a deed against Mrs. Collins, and, as a contract, could not bind her as she was at the time of its execution *feme covert.* Although a nullity in the law, it had however a physical existence; and as it contained a distinct account of the sale of the land, a minute description of the land itself and a specification of the terms of sale, it might very well have been adopted, or ratified, by a subsequent agreement, if that subsequent agreement was in the form required by the law. In such case it is obvious that the binding force of the contract is in the subsequent agreement and not in the deed, and the agreement must therefore be in writing. If the deed can be adopted or set up by a mere parol declaration, made by Mrs. Collins after the removal of her disability of coverture, it would seem to let in all the evils which the statute was designed to guard against." In order to bind the *feme* by her deed, which was an absolute nullity when it was executed, as all our cases admit, there must either be a new consideration for her promise to ratify it (*Bank v. Bridgers, supra*), or she must be prevented from setting up its invalidity by an estoppel *en pais,* but she is not estopped where she has done nothing which has misled another into acting to his prejudice.

"Estoppel by misrepresentation, or equitable estoppel (which is estoppel *in pais*), grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either by contract or of remedy. This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seeks to deny its truth and to deprive the party who has acted upon it of the benefit obtained." 16 Cyc., 722; *Boddie v. Bond,* 154 N. C., 359 (*S. c.,* 158 N. C., 204); *Patillo v. Lytle,* 158 N. C., 95.

"The representation must have been acted upon to the damage of the party acting. It is not enough that the representation has been barely acted upon, for if no substantial prejudice would result by admitting the party who made it to contradict it, he will not be estopped." Bigelow on Estoppel, 23.

"The law does not favor estoppels, and as to estoppels by matter *in pais,* it may be said that unless a person has induced another by representations or declarations to alter his position injuriously to himself, he will not be estopped. The fundamental principle on which the doctrine of estoppel rests is an equitable one—a principle which is intended to suppress fraud and to compel just and fair dealings with all. On no principle of fair dealing and equity can it be held that one should be estopped to protect his rights in a matter because of his conduct in reference thereto and upon which another has acted, but without prejudice to his rights and interests. It cannot be said, with consistency, that a man has taken advantage of his own wrong where his statements have not damaged or injured another." *Rainey v. Hines,* 120 N. C., 376; *Lovelace v. Carpenter,* 115 N. C., 424; Eaton's Equity, p. 169.

There has been no formal ratification in writing. What, then, has been done to validate her deed? The act of advertising did not, as it prejudiced no one, having been withdrawn before any sale. I have not been able to recall any legal principle that holds her bound by these acts, as a ratification, or an estoppel, and she has not ratified otherwise. The tender of the money surely could not have that effect, because that was not her act, but the gratuitous act of the defendant, and she declined to accept the tender and receive the money, which was a distinct repudiation of her void deed, instead of being a ratification of it.

The Court may require her to surrender the note and mortgage, as was suggested in *Scott v. Battle, supra,* at p. 192, if she has them in her possession, or under her control, but there is no reason either in law, or in equity, why it should go beyond this requirement, which will place all parties *in statu quo* and no prejudice will be done any one.

It is manifest that the plaintiff withdrew the property from sale, because, at the time she advertised the same she was not aware of her rights, but supposed that her deed was valid, and as soon as she discovered her mistake she promptly asserted her right by refusing to accept the money tendered and discontinued the prosecution of the sale. This was a repudiation of the deed, rather than a ratification of it, and she has misled or deceived no one, and certainly no prejudice has resulted, and none will follow if the papers are surrendered. The Court, in its judgment, can make this a condition precedent to a recovery or a writ of possession.

It must be remembered that the opinion in *Warren v. Dail, supra,* was confined strictly to the question whether action for damages would lie on a broken contract to convey land made by a married woman, and it was recognized by the learned justice, who spoke for the Court, that the doctrine there considered would not apply to her deed, or so as to compel her to execute a deed for the land, under her contract to do so.

JUSTICE HOKE concurs in this dissenting opinion.

L. B. SASSER, N. E. BUNTING AND THOMAS HILL v. W. N. HARRISS, WALTER H. BUTLER AND D. N. CHADWICK.

(Filed 15 October, 1919.)

Appeal and Error—"Moot Questions"—Appeal Dismissed—Calls—Cities and Towns—Primaries.

Where the trial court has restrained a city board of elections from calling a primary election under the act of 1919, and the election has been held under the prior law, in force at the time, by order of the judge: *Held*, the Supreme Court may not then order another primary, and the question presented becoming a "moot" one, the appeal will be dismissed.

APPEAL by defendant from *Calvert, J.*, at the March Term, 1919, of NEW HANOVER.

Iredell Meares for plaintiff.
E. K. Bryan and A. G. Ricaud for defendant.

BROWN, J. This as an action by the plaintiffs against the defendants, constituting the members of the city board of elections of the city of Wilmington, for the purpose of having declared void the call made by the board for the primary election under the act of the General Assembly of 1919, authorizing the board of elections to call the primary and fix the date for the holding thereof, which act is recited in the record.

The cause was heard before his Honor, Thomas H. Calvert, judge, at the March Term, 1919, of the Superior Court of New Hanover County, and upon said hearing his Honor restrained the holding of the said primary election on the date fixed by the board, and ordered the election to be held on the date as provided by the law in force relative thereto, prior to the passage of the act of 1919, and from the judgment of the court defendants appealed.

It appears that the primary election has long since been held and doubtless the candidates now have been duly elected. Nothing can now be accomplished by setting aside the order of Judge Calvert. If his judgment was reversed this Court could not now order another primary. The question has thus become merely a moot question and there is nothing for the judgment of the Court to operate upon.

The appeal is dismissed.

Appeal dismissed.

KING GROCERY COMPANY v. SOUTHERN EXPRESS COMPANY AND THE AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 15 October, 1919.)

Corporations— Negligence — Damages — Successor Corporations — Express Companies—War Measures.

Where an express company that has received goods for transportation is not liable for damages thereto, neither can another and independent express company since organized, and which took over the business of the former company be held liable, as, in this case, the American Railway Express Company, a war measure. *Friedenwald v. Tobacco Co.*, 117 N. C., 545, cited and distinguished.

CIVIL ACTION, tried before *Calvert, J.*, at September Term, 1919, of ROBESON.

The defendant, the American Railway Express Company, appealed.

The following is the charge of the court and the issues, to all of which the defendant specifically excepted:

"Gentlemen of the jury: There are some issues to be submitted to you. The first is, 'In what sum, if any, is the defendant American Railway Express Company indebted to the plaintiff on account of the loss of merchandise, as alleged in the complaint?' (If you find the facts to be as testified to, you will answer that issue '$2.68.')

"The second issue is, 'In what sum, if any, is the defendant Southern Express Company indebted to the plaintiff on account of the loss of merchandise, as alleged in the complaint?' If you find the facts to be as testified to, then you will answer this issue 'Nothing.'

"Third, 'Did the plaintiff file claim with the defendant Southern Express Company within the time provided by statute?' If you find the facts to be as testified to, you will answer that issue 'Yes.'

"Fourth, 'Did the defendant fail and refuse to pay said claim within three months after the filing of same?' If you find the facts to be as testified to, you will answer that 'Yes' also."

Upon the jury's answer to the foregoing issues, the court as a matter of law answered the fifth issue, "In what sum is the defendant American

Railway Express Company indebted to the plaintiff on account of penalty for failure to pay said claim within the time provided by statute?" $50, to which the defendant American Railway Express Company excepted.

Johnson & Johnson for plaintiff.

McLean, Varser, McLean & Stacy for American Railway Express Company.

BROWN, J. The uncontradicted evidence is, and it is admitted, that the merchandise was shipped prior to the incorporation and organization of the American Railway Express Company. The claim of $2.68 was filed with the Southern Express Company on 3 May, 1916. The American Express Company was organized during the recent war as a war measure for the better operation and control of the express business of the country. At the time this butter was damaged this company was not in existence, but whether it is liable for the acts and negligence of the Southern Express Company we will not determine on this appeal.

It is manifest that there is an inconsistency in the findings of the jury. Under the instructions of the learned judge the jury have found that the Southern Express Company is not liable to the plaintiff on account of the loss of merchandise, as alleged in the complaint. It necessarily follows that if the Southern Express Company, which transported the butter and is alleged to have caused the damage by its negligence is not liable, then the American Railway Express Company, although it succeeded to the business of the Southern Express Company, cannot be liable.

The case of *Friedenwald v. Tobacco Works*, 117 N. C., 545, is not in conflict with this proposition. In that case there was a transfer of all the property rights and franchises of one corporation to a new company organized by the same stockholders and the same directors for the purpose of carrying on the same business. It was held that the new corporation was liable for the debts of the old. It being practically the same business conducted by the same persons under a new name.

In the case at bar no liability has been established against the Southern Express Company, consequently, as the negligence was not the fault of the American Express Company, it cannot be liable if the Southern Express Company is not.

Reversed.

M. F. OWENS v. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, AND NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 22 October, 1919.)

1. **Appeal and Error—Objections and Exceptions—Assignments of Error—Judgments—Rules of Court.**

Exceptions to a judgment, that it was not justified by the facts found or admitted, or to the court's jurisdiction, fall without Supreme Court Rule 27, requiring errors relied on to be assigned in the record, and Rule 19 (2) as to grouping and numbering of exceptions, under penalty of dismissal, for in such instances the appeal itself is an exception.

2. **Carriers of Goods—Statutes—Penalties—Delays in Transportation—Constitutional Law.**

Our statute, Revisal, sec. 2632, imposing upon a railroad company a penalty for the delay in the transportation of an intrastate shipment is in the nature of a police regulation and constitutional and valid.

3. **Carriers of Goods— Federal Control— Parties— Director of Railroads—Orders—Statutes—Penalties—Police Regulations.**

Under the express provision of the General Order of the United States Railroad Administration No. 50, issued 28 October, 1918, requiring that the Director General of Railroads be the party defendant in certain actions that theretofore could have been brought against a common carrier, "actions, suits or proceedings for the recovery of fines, penalties and forfeitures" are excluded; which is in conformity with the act of 21 March, 1918, sec. 10, an action to recover the statutory penalty for the carrier's unreasonable delay in transporting an intrastate shipment, brought in the State court, should be against the carrier alone. Revisal, 2632.

4. **Same—Pleadings—Amendments—Courts—Appeal and Error.**

Where the action is to recover from the carrier the value of a lost part of an intrastate shipment as well as the statutory penalty (Revisal, 2632) for an unreasonable delay in the transportation of the whole thereof, the Director General of Railways is a necessary party as to the recovery of the value of the part lost, and it is not error for the Superior Court to permit an amendment to the complaint to this effect; and where the value of the lost goods has subsequently been paid into court a judgment for the statutory penalty will be affirmed on appeal.

APPEAL by defendant from *Devin, J.*, at April Term, 1919, of TYRRELL.

This was an action brought under Rev., 2632, before W. L. Godwin, J. P., to recover the penalty of $40 for delay in delivery of two bags of corn, and the value of one bag of corn lost in transit, shipped from Asheboro, N. C., on 27 March, 1918, and received at Columbia, N. C., on 16 April, 1918.

The evidence showed that three bags were shipped and only two received. On appeal from the justice in the Superior Court, his Honor allowed the plaintiff to make Walker D. Hines, Director General of Railroads, a party defendant, the action originally having been brought against the Norfolk Southern Railroad Company. The Superior Court rendered judgment for $21 as the penalty for twelve days negligent delay, the value of the corn lost having been paid into court by the defendant.

H. L. Swain, Aydlett, Simpson & Sawyer for plaintiff.
Small, MacLean, Bragaw & Rodman for defendants.

CLARK, C. J. The plaintiff objects that there is no assignment of error. Rule 27 requires that the errors relied on should be assigned in the record, and Rule 19 (2) of this Court prescribes that the exceptions which are relied upon shall be grouped, numbered and set out immediately after the statement of the case on appeal under penalty of dismissal if this is not done. This is a very necessary requirement, as this Court has repeatedly stated, and it must be strictly adhered to. *Jones v. R. R.,* 153 N. C., 419, and citations thereto in the Anno. Ed. But there is an exception when the appeal is upon the ground that the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction. In such case the appeal of itself is an exception.

The court found the following facts by consent: The plaintiff delivered to the defendant carrier, at Asheboro, N. C., 27 March, 1918, three bags of seed corn for shipment to plaintiff at Columbia, N. C.; two of these said bags were delivered to plaintiff on 16 April, 1918; the carriage of said goods by the defendant railroad was entirely over its line and in the State of North Carolina, and there being between Asheboro and Columbia three intermediate points, allowance should be made therefor in accordance with the statute; that the distance between the initial point and the point of delivery is 285 miles. Thereupon the court adjudged that the plaintiff was entitled to recover the penalty of $21—*i. e.,* ten dollars for the first day, one dollar for eleven succeeding days, after allowing two days at the initial and six days for the three intermediate points, as provided by statute.

The court further finds that one of the bags of seed was lost in transit; that its value was $3.50, which the defendant has paid, and rendered judgment for $21, with interest from the first day of the term and the costs.

The transcript shows an exception to the order making Walker D. Hines, Director General of Railroads, an additional party defendant, and the appeal from the judgment presents the validity of the judgment for the recovery of the penalty prescribed by the statute.

The U. S. Supreme Court, in *R. R. v. North Dakota,* 39 S. C. Reporter, 502, in an opinion by *Chief Justice White,* filed 2 June, 1919, held that under the act of 21 March, 1918, section 10, authorizing the

President to fix rates for railroads under Federal control, but providing for review by the Interstate Commerce Commission, and section 15, declaring that "nothing in the act shall be construed to impair lawful police regulations of the State," the President had power to prescribe intrastate rates for railroads under Federal control, though such rates shall conflict with the rates previously fixed by State authority.

Our Rev., 2632, provides that in shipment of less than a carload there shall be a penalty of ten dollars for the first day's delay and a dollar per day for each succeeding day shall be allowed. In this case there was a delay for twenty days. After deducting the exemption of eight days, as properly allowed by the judge, there was a net delay of twelve days, the penalty for which is $21, as correctly stated by the judge. This was an intrastate shipment and this Court has held that Rev., 2632, is a valid law. *Davis v. R. R.,* 147 N. C., 68; *Wall v. R. R., ib.,* 407.

The statute prescribing such penalty for delay was a police regulation and section 15 of the act of 21 March, 1918, as recited by *Chief Justice White* in *R. R. v. North Dakota, supra,* declared that "nothing in that act should be construed to impair lawful police regulations of the State."

This was the view taken by the U. S. Railroad Administration, for in General Order No. 50-A, 11 January, 1919, it is provided: "General Order No. 50, issued October 28, 1918, is hereby amended to read as follows: *It is therefore ordered,* that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise: *Provided, however,* that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures."

It seems clear from this order that the Director General of Railroads did not assume to repeal the State police regulation fixing a penalty for delay in the transportation of freight between two points in this State, but only directed that he should be made a party defendant in other actions brought against any railroad company, and he provided: "This order shall not apply to actions, suits or proceedings, for the recovery of fines, penalties and forfeitures." He thus recognized, as *Chief Justice White* has stated, that the police regulations were not impaired by the Federal statute, but provided that he should be exempt from being made a party to the suits therefor.

When this action was instituted, a part of the recovery sought was payment for the bag of corn not delivered. He was, therefore, to that extent, a proper party to the action, and the exception to the amendment making him a party was properly overruled, but the judgment stands good as to the defendant railroad company for the penalty imposed by the statute.

Affirmed.

RALEIGH IMPROVEMENT COMPANY v. W. J. ANDREWS ET AL.

(Filed 22 October, 1919.)

Contracts—Corporations—Subscription to Stock—Abandonment—Evidence—Trials.

Upon this petition to rehear, the Court adheres to its former opinion (176 N. C., 281), except to permit, on the next trial, the defendant to offer evidence of abandonment of the building for which the plaintiff was incorporated, and brings action to recover balance of defendant's subscription to the shares of stock; and the petition is dismissed.

PETITION to rehear.

J. C. Biggs and Willis Smith for plaintiff.
J. S. Manning and A. B. Andrews, Jr., for defendants.

BROWN, J. This is a petition to rehear this cause decided at Fall Term, 1918, and reported in 176 N. C., 281. Upon careful consideration of the case, we adhere to all that is said in our former opinion, except to the extent that on the next trial the defendants may offer all evidence of abandonment which they may have, irrespective of what is said in paragraph number 2 of our former opinion. We will not undertake to say that there is no evidence of an abandonment of the purpose to erect an apartment house. At the time the subscription to the stock was made, on 17 February, 1914, it is not contended that the purpose to erect the apartment house had been abandoned. It is claimed that it was abandoned later on in the year 1915. We leave this as an open question to be determined at the coming trial.

In our former opinion we said: "It is true that on being satisfied that stockholders have paid in an amount equal to their engagements, so as to make the burden equal amongst them all, a court of equity will sometimes interfere in case of an abandonment of the undertaking to prevent further calls upon such stockholders, but no such conditions appear to be presented upon this record and no such equitable relief is asked."

This question of abandonment becomes important in case the defendants desire to ask equitable relief upon the grounds set out in the opinion, and if so, they will be allowed to file additional pleadings setting it up, in which case proper issues may be submitted to the jury.

Petition to rehear dismissed.

R. M. GRANT & CO. v. COUNTY BOARD OF EDUCATION OF WAKE COUNTY.

(Filed 22 October, 1919.)

Counties—Municipal Corporations—Bonds—Conditions Precedent—Approval of Attorney—Legality—Good Faith.

Under an agreement between a county board of education and the proposed purchaser of its bonds, that the acceptance should be subject to the approval of the legality of the issue by the latter's attorney, the adverse opinion of the attorney, given in good faith, is a complete defense to a suit by the board to compel the purchaser's acceptance of and payment for the bonds, and in this case it is *held*, that the reason given by the attorney for his unconditional opinion, that the tax to be levied would not carry the bonds to maturity, and that it must be shown that the required notice of the election had been given, etc., is not subject to the objection that the attorney was passing upon the bonds only as an investment, and not upon their legality, or afford in itself evidence of his bad faith, as a matter of law, in giving his opinion.

CLARK, C. J., concurs in result.

CIVIL ACTION, tried before *Allen, J.*, and a jury, at March Term, 1919, of WAKE.

The action is to recover $500 deposited on condition in a negotiation for purchase of bonds to be issued for defendant, same to be used as part payment on bonds if they were approved and accepted by plaintiff, and otherwise to be returned. On denial of liability and issue submitted, his Honor being of opinion that on all the evidence, if believed, plaintiffs were entitled to recover, and so instructed the jury. Verdict and judgment for plaintiff, and defendant having duly excepted, appealed.

R. W. Winston and J. Crawford Biggs for plaintiff.
N. Y. Gulley, Percy J. Olive, and J. C. Little for defendant.

HOKE, J. Chapter 457, Private Laws 1913, authorized defendant board to issue coupon bonds in the sum of $25,000, payable, not exceeding 30 years from date of issue, on approval of the voters of the said school district, and also a tax levy not to exceed 20 cents on the $100 of property, and 60 cents on the pole, to meet the interest on the same as it accrued, and to create a sinking fund to pay off the principal of said bonds at maturity. An election having been held and the measure approved by the voters, bonds to the amount specified, and payable thirty years from date, 1 January, 1917, were prepared, and plaintiffs, dealing in purchase and sale of municipal bonds, made a bid therefor, accompanied by the following stipulations:

"This bid is made for prompt acceptance and is subject to the legality and regularity of the issue being approved by our attorneys, you agreeing to furnish certified copies of all papers which may be necessary, in their opinion, to establish such legality and regularity in all respects. You further agree to pass any additional, reasonable resolutions which may be necessary, in the opinion of our attorneys, to complete the record of proceedings.

"As an evidence of good faith, we attach hereto certified check for five hundred dollars ($500), drawn on the American Exchange Bank of New York and made payable to the order of Board of Education, Wake County, N. C., which is to be held by you pending compliance with the conditions of this bid, and is only to be used as part payment for said bonds when approved and delivered to us; otherwise, said check is to be returned to us or our representative at once."

On 3 January, 1917, this bid was accepted by defendants in terms as offered and receipt of the $500 was acknowledged. The bid, stipulation and acceptance, also the resolutions of the board touching the proposed bond issue, and the action of the voters on the proposition, together with the notices concerning the election, were properly submitted by plaintiff to the attorney, Charles B. Wood, of the firm of Wood & Oakley, Chicago, Ill., with the following letter accompanying same:

"GENTLEMEN:—We hand you herewith certify copy of the proceedings had in connection with an issue of $25,000, Wake Forest Graded School District, Wake County, North Carolina, 5 per cent bonds.

"Kindly let us have your opinion as to the legality of this issue, based on the enclosed record, at your convenience."

On 30 January said attorney, in reply, wrote plaintiffs as follows:

"GENTLEMEN:—"I will approve $25,000 school bonds of Wake Forest Graded School District, North Carolina, dated January 1, 1917, provided the county board passes a new order making the bonds payable serially in such a way that the same can be taken care of, both principal and interest, by the twenty-cent tax which the Legislature has authorized. This tax will not carry the bonds running straight thirty years. In passing the resolution care must be taken to fix the place of payment of the principal and interest and to provide one single date as the date of the bonds, and that date, of course, should be January 1, 1917, and no other date should appear.

"It must also be shown that the election notice was posted thirty days prior to the election."

After some further correspondence between plaintiff and defendants, in which defendants insisted that plaintiffs admitted the validity of the bonds, and that the tax levy allowed by the law was amply sufficient to pay the current interest and create the sinking fund required by the statute, defendants declined to issue the bonds serially or otherwise than as tendered a straight thirty-year bond. On these facts being communicated to the attorney on 5 April, 1917, he wrote, declining to approve the bonds, as follows:

MESSRS. R. M. GRANT & COMPANY,
Chicago, Ill.

GENTLEMEN:—I decline to approve $25,000 school bonds of Wake Forest Graded School District, North Carolina, dated January 1, 1917, because the twenty-cent tax levy provided in the act of the Legislature is not sufficient to pay these bonds, and for the further reason that it is not shown that the election notice was posted thirty days prior to the election.

Yours truly,
CHARLES B. WOOD.

There was evidence offered to the high character and reputation of plaintiff firm and of the attorney to whom the question of the bond issue was submitted, and by the defendant that the preliminary notices for the election required by section 2967 and affecting the election, had been properly given; that is, that the same had been published thirty days preceding in a newspaper, and by advertisement posted at the courthouse door and four other public places in the county, etc. Also that the assessed property in the school district and the poles therein were sufficient to supply the amount of taxes required by the law for the proposed bond issue, both current interest and a proper sinking fund, etc.

On these, the pertinent facts of the controversy, the question chiefly presented was fully considered by us in *Webb v. Trustees*, 143 N. C., 299, and it was there held, in effect, that when the designated attorney, acting in good faith, has given an adverse opinion as to the validity of the bonds, the bidder was justified in refusing to proceed further, and in such case the conditional deposit is recoverable by the express terms of the agreement; and the position is not affected by the fact that the opinion of the attorney may have been erroneous unless so arbitrary and capricious as to permit the inference of bad faith. Speaking to the subject, in his well sustained opinion, *Associate Justice Connor* said:

"It is uniformly held by the courts that in the absence of any allegation or proof of bad faith or arbitrary conduct on the part of the person selected to pass upon the validity of the bonds or performance of the contract on the part of the person seeking its enforcement, his approval is a condition precedent and is essential to the right to demand performance. It is usually held that when it appears from the pleadings that such provision is a part of the contract, the failure to aver compliance is demurrable." A like ruling has been made in other jurisdictions and is the principle very generally approved in the decisions on the subject. *Kinnicut v. Joint School Committee,* 165 Wis., 654; *U. S. Trust Co. v. Inc. Town of Guthrie,* 181 Iowa, 992; *City of San Antonio v. Rollins & Sons* (Tex.), 127 S. W., 1166.

In the *Iowa case, supra,* the Court held: "The actual rendition of an attorney of an honest but erroneous opinion that a bond issue is illegal, furnished a complete protection to a prospective purchaser in his refusal to buy under his contract of purchase, provided the bonds be illegal to the satisfaction of our counsel."

And in the *Texas case,* 127 S. W., 1166, it was likewise held as follows:

"Where a bid for municipal bonds provided that prior to delivery the city should furnish procedure satisfactorily evidencing the legality of the bonds to the bidder's attorneys, and that the deposit should be promptly surrendered in case the bidder's attorneys were unable to approve the legality of the bonds, such approval constituted a condition precedent to the city's right to forfeit the deposit, in the absence of a showing that the attorneys' disapproval was fraudulent, capricious, and in bad faith."

In the present case there is no claim or suggestion that there has been any bad faith in fact, either on the part of the bidders or their attorneys. Both are shown to be of high reputation and character, and while we do not pass ultimately upon the correctness of the attorneys' opinion, or the grounds upon which it is made to rest, we may say that his objections are sufficiently serious to challenge inquiry, and assuredly they are not so devoid of merit as to show that he acted capriciously or so as to permit an inference of bad faith as a matter of law. We do not understand that the defendant seeks to question the correctness of this general principle as approved and illustrated in the authorities cited, but it is very earnestly insisted that on perusal of the correspondence and other evidence pertinent to the inquiry it will appear that the attorney has not given an opinion on either the legality or regularity of the bonds as contemplated in the agreement between the parties, but departing from its purpose and meaning, he has disapproved the bonds only because he considers them an undesirable investment.

On the facts in evidence, we do not think such a position can be at all sustained. The bonds were submitted to the attorney with a request for his opinion as to their "legality." His reply formally disapproved the bonds, and, in addition, his deposition is put in evidence, in which he repels the insinuation of bad faith, reaffirms his opinion against the validity of the bonds, stating more fully the grounds upon which such opinion is based, and raising what he assuredly regarded as sound objections to their "legality," and on the record we concur in his Honor's view that if the testimony is believed, it shows that the attorney gave his opinion in good faith and that he acted throughout within the scope of his mission and in the proper performance of the duties intrusted to him.

There is no error and the judgment of the Superior Court is affirmed.

No error.

CLARK, C. J., concurring in result: When the General Assembly authorizes the issue of bonds by the State or a county, township, municipality, or board, the duties of the commissioners or boards authorized to issue such bonds are restricted in issuing the bonds to the amount and in the manner prescribed by the statute. When the bonds are offered for sale this must be done in compliance with the terms prescribed by the statute. If the highest bidder afterwards declines to take the bonds, the only question which can be presented is whether or not the bonds are a valid indebtedness, and regularly issued in accordance with the terms of the statute.

There is no authority conferred upon the commissioners of a county, or any board, to make private contracts with bidders containing stipulations as to matters not set forth in the statute.

If such stipulations as that they shall meet the approval of the lawyers for the bidders were valid, that would raise simply the question whether such lawyer is of that opinion, and if he rejects the bonds that ends the controversy. There is nothing for the courts to pass upon.

To permit the commissioners, or boards, to make outside agreements that bonds shall meet the views of the bidders in matters not prescribed by the statute would be to recognize in them *ultra vires* powers, and it would give to the counsel of the bidders power to raise any moot question which their fancy or whim may suggest.

This Court has been very slow to answer inquiries of the Legislature on hypothetical questions, and it will only do so in grave matters requiring such action. We certainly should not recognize the unrestricted power of counsel for bidders to raise any question they see fit, and by taking an adverse view to the officers authorized to sell the bonds, present to the courts for decision any whimsical or fanciful moot question which

At the conclusion of all of the evidence the defendants moved for judgment of nonsuit, which was overruled.

There was a verdict in favor of the plaintiff finding that they were the owners of the land in controversy and judgment was rendered thereon against the defendants, who appealed.

Irvin v. Tucker and H. L. Lyon for plaintiffs.
MacRackan & Greer and S. Brown Shepherd for defendants.

ALLEN, J. There is ample evidence to establish the contention of the plaintiffs that the black lines are the true boundaries between the plaintiffs and defendants, and also to show title by adverse possession, and we must assume that this evidence was fairly submitted to the jury as there is no exception to the charge.

The surveyor testified: "The description in the deed from Ann K. Blue to Dougald M. Blue covers the land in controversy, and the description in the complaint (which was read to the witness) covers the land in controversy."

Mrs. A. D. Beal, who said she had known the land for forty years: "I have lived on the land described in my mother's deed all my life. I know the corner in dispute. My mother claims black E to be the true beginning corner of one tract of the land and Mr. Brown claims red A to be the beginning corner; I don't understand the map. Mr. Smith's fence was directly on the line when Mr. Brown bought the land. That is where the surveyors run. The fence was built from the time I was a child until after I was grown. I do not know when the Browns began to claim that black E was not the right corner."

W. A. Smith: I know the land in dispute in this action. I owned the land at one time claimed by the Browns. I am the grantor in the deed to Crandall Brown. I know the land of Jacob Webb, beginning at a stake, Mrs. M. E. Blue's corner, containing 53 acres. I know where the corner is on the map at black D. I know the line from black D running to black E. I was there when it was run. It was a marked line. That was the line between Mrs. Blue and myself. I know where the corner is of the 41 acres in the second tract. A. F. J. Council ran that line. I know where the corner is at black F. That is the southeast corner of the 41-acre tract. Red B. It is side of the railroad. There was a line running from black E at the time I owned the land. It was a marked line from E to F. I was acquainted with the corners black E and F. On part of the line there was no trees. There was an old field. My fence is on that line in front of the house I sold Mr. Brown. I showed him the land I sold him. I told him the line was where the fence was. It is the black line on the map. I never set up any claim to the land between the black line and the railroad.

The black line was on the south side of the railroad, the only line, and was run there first in 1876 by Lovett Malpass, and in 1890 by J. W. Council. I was present when Malpass ran the line. It was run for me. My father and uncle had it run. It was the dividing line between me and my uncle. I don't remember whether the line was visibly fixed in 1876 or not. But in 1890 Mr. Council ran the line and he made a plain line.

"Q. Who was in possession of the land in dispute in 1890?

"My uncle, as long as he lived, and after his death my aunt, Mrs. M. E. Blue, at the time I sold Mr. Grandel Brown the land, I told him the fence was on the line. That is the same land Mrs. Blue now claims."

I. C. Duncan: "I am county surveyor. At black F there was a corner then, along the line is a kind of hedgerow. An old hedgerow. The corner at black F looks as if it had been there several years. From black D to black E, in the first tract, there was a marked line all the way through. I saw a tree in Joe Brown's field marked on both sides, three chops and a blaze. The chops looked as if they were 25 or 30 years old. The tree corresponded, or is in line, with an old line coming out of the green swamp from black E. There is no marked line from red A to red D of either tract."

This evidence, which was accepted by the jury, shows a fence, maintained for many years, a hedgerow and marked lines along the black lines, and possession for thirty or forty years, which fully justifies the verdict of the jury.

The controversy has doubtless arisen because the land covered by the railroad right of way was considered in locating the boundary of the northern half of the two tracts.

This exception to the refusal to nonsuit is the only one relied on in the brief, although one other, sustaining an objection to a question asked a witness, is referred to, but it is not made to appear what answer would have been made and it cannot therefore be considered.

We find no error in the trial.

No error.

COMMISSIONERS OF HOKE COUNTY v. TOWN OF RAEFORD.

(Filed 22 October, 1919.)

1. **Municipal Corporations—Counties—Towns—Highways—Streets—Bridges —Actions.**

The incorporation of a town included in its limits existing county highways over which were two bridges that, since then, the county commissioners rebuilt of its own volition without the request or concurrence of the town. These highways were not city streets, though their maintenance were important to both the town and county, but were never recognized as such by the town authorities, or control thereof assumed by them: *Held*, the county may not recover of the town the cost they had paid for rebuilding the bridges. The question of whether it was the duty of the county to build these bridges is not presented.

2. Municipal Corporations—Counties—Towns—Streets— Discretion— Necessity.

Municipal corporations have the right, within their judgment of the necessity or expediency, to open public streets and to locate and construct necessary bridges over them.

3. Appeal and Error—Findings—Pleadings.

An allegation of the complaint, denied in the answer, is valueless on appeal in the absence of a finding thereon by the trial judge who, under an agreement of the parties, was to find the facts in controversy.

WALKER and HOKE, JJ., dissenting.

CIVIL ACTION, tried before *Bond, J.*, at April Term, 1919, of HOKE. Plaintiffs appealed.

J. W. Currie for plaintiffs.
Smith & McQueen for Defendant.

BROWN, J. This action is brought by the commissioners of Hoke County to recover from the town of Raeford the cost of rebuilding certain bridges on two public highways within the town. A jury trial was waived and the court found the following facts:

That the places at which the bridges in question were constructed are inside the corporate limits of the town of Raeford; that they are on roads, laid out after the town of Raeford was incorporated, said roads running through the town and being public roads of the county. The court finds that the places at which the bridges were constructed are not on any one of the public streets of the town of Raeford, and that the authorities of said town have never assumed control in any way of the two roads at the place where the bridges were constructed.

The court further finds that the roads upon which said bridges were constructed are used by large numbers of people in going into and going away from the town of Raeford, and that it is important to the town, and also to the county, that the roads shall be in proper condition, as one of them is a part of the Atlanta and Washington Highway.

Upon consideration of the facts admitted in the pleadings, coupled with the findings of fact which appear in this judgment, the Court is of opinion that the town of Raeford is not liable to plaintiff.

The question presented here is not whether plaintiff could have been made to have constructed the bridges referred to. The fact is, they did it, and so far as the findings of the court show, without any request or authority from the defendant.

It is well settled that municipal corporations have the right to open public streets and to locate and construct necessary bridges over them, and such corporations are the sole judges of the necessity or expediency of exercising this right. *Stratford v. Greensboro,* 124 N. C., 127; *Waynesville v. Satterthwaite,* 136 N. C., 227.

The Court finds that the places at which the bridges were constructed are not any part of the public streets of the town of Raeford, and that the authorities of such town have never assumed any control or jurisdiction in any way over the two roads at the place where the bridges were constructed. These crossings appear to be on private property of individuals. Inasmuch as it has been found as a fact that these bridges do not constitute any part of the public streets of the town over which its corporate authorities have assumed jurisdiction, we fail to see why the town should be charged with the expense of rebuilding them. The question presented here is not whether it was the duty of the county commissioners to rebuild these bridges, but whether, having done so without any request or authority from the defendant, they can recover the cost from it. It appears that these bridges were across public roads of the county before the incorporation of the defendant and constitute a part of the public roads of the county. In the face of the finding that the commissioners of the town had never assumed jurisdiction over these roads, and had never undertaken to keep in repair these bridges, we are of opinion that the plaintiff cannot recover. It is true it is alleged in the complaint that this work was done at the request of the defendant's commissioners by the road force of the county, but this allegation of the complaint is specifically denied, and in the absence of a finding of fact supporting it, it is valueless and constitutes no ground for a recovery.

Affirmed.

WALKER, J., and HOKE, J., dissenting.

ROBERT SANDERSON v. SUSAN SANDERSON.

(Filed 22 October, 1919.)

Divorce—Action—Injured Party—Statutes.

The consolidated statutes, ch. 238, sec. 8, Public Laws of 1919, requires, for the dissolution of marriages, that the application for divorce must be on the application of the injured party, on the several grounds enumerated, one of them (sub-sec. 5) in case of separation and living apart of the husband and wife for ten successive years, the plaintiff residing in this State for that period; and where the husband sues for a divorce and it is established that his cruel and inhuman treatment had caused the separation, he is not the injured party and may not take advantage of his own wrong by obtaining a decree of divorce.

APPEAL by defendant from *Calvert, J.*, at the September Term, 1919, of ROBESON.

This action was instituted by plaintiff to obtain a divorce from his wife, the defendant, on account of ten years separation. The defendant answered and did not deny the separation, but set up that the same was caused by the cruel and inhuman treatment that she had received from the plaintiff, and that she was the injured party in such separation, and that the plaintiff ought not to be allowed to obtain a divorce from her and escape the marital obligation on account of his own wrong. These facts are established by the verdict, which finds that the defendant was the injured party in the separation.

The verdict of the jury was as follows:

1. Were the plaintiff and defendant duly married, as alleged in the complaint? A. "Yes."

2. Did the plaintiff and defendant live separate and apart continuously for ten successive years immediately preceding the institution of this action and the filing of the complaint? A. "Yes."

3. Has the plaintiff been a resident of the State of North Carolina for ten years next preceding the institution of this action? A. "Yes."

4. Was the plaintiff the injured party? A. "No; the defendant was the injured party."

The defendant moved for judgment on the verdict, which was refused and the defendant excepted.

Judgment for the plaintiff and the defendant appealed.

Johnson & Johnson for plaintiff.
McLean, Varser, McLean & Stacy for defendant.

ALLEN, J. The appeal of the defendant presents the question for decision of the right of the husband to a divorce on the ground of a separation for ten years, when the separation has been brought about by his abandonment of his wife or by forcing her to leave him by his own misconduct.

The Consolidated Statutes, which went into effect 1 August, 1919 (Pub. Laws 1919, ch. 238, sec. 8), provides, in chapter 30, section 5, that "marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, *on application of the party injured*, in the following cases:"

1. If the husband commits adultery.

2. If the wife commits adultery.

3. If either party, at the time of the marriage, was and still is naturally impotent.

4. If the wife, at the time of the marriage, is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.

5. If there has been a separation of husband and wife, and they have lived separate and apart for ten successive years, and the plaintiff in the suit for divorce has resided in this State for that period.

It is thus seen that all causes for divorce are collected in one section of one statute, and that the same condition is imposed as to each, that the divorce shall be granted "on application of the injured party," which, as the grounds for divorce are statutory, has been frequently held to mean that the party to the marriage contract, *who is in the wrong,* cannot obtain a divorce. *Whittington v. Whittington,* 19 N. C., 64; *Moss v. Moss,* 24 N. C., 56; *Foy v. Foy,* 35 N. C., 90; *Tew v. Tew,* 80 N. C., 316; *Setzer v. Setzer,* 128 N. C., 170; *House v. House,* 131 N. C., 140.

All of these cases, except *Moss v. Moss,* were cited and approved in *Page v. Page,* 161 N. C., 175, the Court saying, in conclusion: "No one will be allowed to take advantage of his or her own wrong. This maxim was applied to a case of divorce by *Judge Pearson,* in *Foy v. Foy, supra.* In the words of the statute, Code, sec. 1285; Revisal, sec. 1562, the application for the divorce must be made 'by the party injured,' and these words were construed, in *Steel v. Steel,* 104 N. C., 631, to mean that neither of the spouses is entitled to divorce if his or her marital fault provoked or induced the alleged misconduct of the other."

"We have the highest authority for the precept, 'that whosoever shall put away his wife, saving for the cause of fornication, *causeth* her to commit adultery'; which is not more obligatory as an injunction of revealed religion, than it is just and true as a proposition in the philosophy of the human mind and heart" (*Whittington v. Whittington, supra*), a principle embodied in the statute, which denies a divorce except to the injured party, and applied in the decisions of this Court.

The plaintiff insists, however, that the question has been decided differently in *Cooke v. Cooke,* 164 N. C., 272, and, as this is the last utterance of the Court, it destroys the effect of prior decisions, but an examination of the opinions in the *Cooke case* demonstrates that it does not question the correctness of the principle that one who is in the wrong cannot procure a divorce under a statute which gives the right of action to the injured party alone, and that the decision rests upon the ground that the cause for divorce on account of separation for ten years, as it then stood, was provided for in a separate statute, which did not have in it the condition, "on application of the injured party," and that, although in form an amendment to the Revisal, the language of the statute was so explicit the Court was "not at liberty to interpolate or superimpose conditions and limitations which the statute itself does not contain." *Hoke, J.,* in the opinion of the Court.

Brown, J., who cast the deciding vote, makes it clear that this was the reason moving him, as he says in a concurring opinion: "It is contended that the plaintiff must allege and prove that the plaintiff is the injured party. There are no such words in the act, although they are and have been in the Revisal long prior to the act of 1907.

"I think those words plainly apply to those causes of action which grow out of the personal misconduct of the parties. They would be out of place in the act of 1907, and are entirely inconsistent with its spirit and purpose."

The *Cooke case,* then, conceding it was correctly decided, when considered in connection with the reasoning of the Court and the ground of the decision, does not militate against the principle announced in the earlier cases, and is no authority for the position that one who is in the wrong may now have a divorce on account of a separation of ten years since the statute, making this a cause for divorce, has been taken from its original setting and has been made a part of a statute, which gives no right of action except to the injured party.

The question decided in *Ellett v. Ellett,* 157 N. C., 162, was that there was error in the charge of the Court as to the degree of proof required on the seventh issue, and for this error a new trial was ordered on the whole case.

We are therefore of opinion the finding on the fourth issue prevents the plaintiff from obtaining the divorce sued for, and it would be a harsh and cruel rule to declare otherwise, as to do so would permit a husband to drive a loving, faithful wife from his home and refuse to permit her to return for ten years, and then reward his conduct by granting him a divorce because he and his wife had lived separate for ten years.

Reversed.

ROBERT BLACKWOOD v. SOUTHERN RAILWAY COMPANY.

(Filed 22 October, 1919.)

Assumpsit—Indebitatus Assumpsit—Carriers of Mail—Postmasters—Delivery of Mail—Party Benefited—Contracts.

Under the equitable principle of *indebitatus assumpsit,* it is *Held,* that where a storekeeper in a town was also postmaster, and believing that as such it was a part of his official duties to deliver the mail at the train, had done so for four years when, in fact, this was the duty of the carrier, for which it had received compensation under its contract with the United States Government, the railroad company knowingly receiving the benefit from such services is liable for them. *Sanders v. Ragan,* 172 N. C., 612, cited and approved.

CIVIL ACTION, tried before *Lyon. J.,* and a jury, at March Term, 1919, of DURHAM.

The action is to recover the value of services rendered for defendants' benefit in carrying the mail from the postoffice in Carrboro, said county, to the railway station. On denial of liability, there was verdict for plaintiff; judgment, and defendant excepted and appealed.

R. O. Everett for plaintiff.
Fuller, Reade & Fuller for defendant.

HOKE, J. On the hearing, recovery was resisted by defendant principally for the alleged reason that plaintiff did this work for his own advantage in that by keeping the mail pouches open that much longer his cancellation of stamps was increased, thereby adding to his salary, and that the services for which pay is now sought were and are intended to be gratuitous. But on a perusal of the pleadings, the evidence and the charge of the court, this view has been rejected in the verdict and the facts as accepted and acted on by the jury are to the effect: that from 1910 to 1917 plaintiff engaged in business; was also postmaster at Carrboro, in said county, the office being from 200 to 300 feet from the railroad station where defendant delivered the mail. That for four consecutive years of that period plaintiff, under the impression that it was a part of his official duty, and with full knowledge of the defendant company, its agent, etc., carried the mail from the station to the office four times per day, to his great inconvenience and the interruption of his personal business. That in 1915, having ascertained that defendant company was under a contract for hire with the Government to do this work, plaintiff stopped, and since that time it has been undertaken by company, and same let out by them for pay, etc.

In the case of *Sanders v. Ragan,* 172 N. C., 612, the Court said: "That the action of *indebitatus assumpsit* is dependent largely on equitable principles and in the absence of some special contract controlling this matter, and unless in contravention of some public policy, it will usually lie wherever one man has been enriched or the value of his estate enhanced at another's expense under circumstances that in equity and good conscience call for an accounting by the wrongdoer." Citing *Mitchell v. Walker,* 30 N. C., 243; Keener on *Quasi*-Contract, p. 318.

In application of the general principle, it is ordinarily true that in the absence of a special contract where one person has rendered services of value for the benefit of another, or which the latter is under a binding obligation to perform, and such services and the benefits therefrom, not intended to be gratuitous, have been knowingly accepted and received, the law will imply a promise to pay what such services are reasonably worth.

It is said by an intelligent commentator, 15 A. E., 2d Ed., pp. 1082-83, that there are limitations on the principle, among them, that the party benefited must have the legal power to make a direct contract of a similar kind; and again, the services and benefits must have been received under circumstances that afforded the person benefited the opportunity to reject them, etc., but no such modifications are presented in the present case, where, as stated, it has been made to appear that the services were performed by plaintiff under the impression that they were a part of his official duties.

That this was permitted by the defendant with full knowledge of attendant conditions, and further, with the fair and reasonable inference that the company has been compensated for this work that they knowingly allowed plaintiff to do, and of which they have received the benefits.

The well considered case of *Blowers v. So. Ry.*, 70 S. C., 377, seems to be in direct support of the present recovery and several decisions of our own Court are in full approval of the principle upon which it rests. *Sanders v. Ragan, supra; Blount v. Guthrie,* 99 N. C., 92; *Bailey v. Rutjes,* 86 N. C., 517; 15 A. and E., 2d Ed., p. 1083; 40 Cyc., pp. 2810-11.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

J. W. PENDERGRAPH AND A. L. PENDERGRAPH v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 22 October, 1919.)

1. **Pleadings—Amendments—Courts—Statutes.**

   The Superior Court has plenary power to allow an amendment to the complaint in an action on contract appealed from a justice of the peace. Revisal, 1476.

2. **Carriers of Goods—Express Companies—Contracts—Negligence—Notice—Damages—Delay of Delivery.**

   The object of an express company is to secure prompt and safe delivery of goods it receives for transportation; and where, upon the shipment of carpenter's tools, the shipper has notified the company of the necessity for prompt delivery at destination, which the latter has promised by a certain day, the transaction is sufficient to put the express company on notice that damages will reasonably result to the shipper for consequent expenses, loss of time as a carpenter for the want of the tools, etc., if not delivered, and such are recoverable in the event of a protracted and unreasonable delay, proximately caused by the carrier's negligence.

3. **Carriers of Goods—Negligence—Damages—Minimizing Loss.**

Where a shipper by express has been damaged by the negligence of the carrier in delivering the shipment, it is the duty of the shipper to reasonably lessen the amount, and for the judge to so charge the jury.

4. **Courts—Jurisdiction—Justices of the Peace—Contracts—Torts—Carriers of Goods—Express Companies.**

A shipper by express who has been damaged by an unreasonable delay in the delivery of the goods may bring his action upon contract within the jurisdiction of a justice of the peace, and waive the tort beyond this jurisdiction, or sue in the Superior Court in a larger sum upon the tort.

5. **Carriers of Goods—Express—Non-delivery—Damages—Value of Goods—Verdict—Instructions.**

Where a shipper sues in a justice's court within its jurisdiction for the nondelivery of the goods, including both the value of the goods and the consequent damages from the delay, the trial on appeal in the Superior Court will not be disturbed because of delivery having later been made, where it appears that the verdict excluded under the evidence and instructions of the court, the value of the goods, and only included the damages the plaintiff had sustained by reason of the delay.

6. **Parties—Actions—Principal and Agent—Surplusage—Carriers of Goods—Express Companies.**

Where an agent of an express company knowingly receives as one shipment goods owned by two persons, and issues the bill of lading to one of them, in a suit for damages arising out of the transaction the one to whom the bill of lading was issued is regarded as the agent of the other, and making such other person a party plaintiff is not erroneous.

7. **Carriers of Goods—Express Companies—Negligence—Bills of Lading—Contracts—Void Stipulations.**

An express company, as a common carrier, cannot make a valid stipulation in its bill of lading, against its own negligence, by a provision that a recovery exceeding fifty dollars cannot be had if the goods to be transported "were hidden from view."

APPEAL by defendant from *Lyon, J.*, at March Term, 1919, of DURHAM.

On 31 August, 1918, the plaintiffs delivered to the defendant company two boxes of carpenters' tools at Lee Hall, Va., for shipment to Norfolk, Va. The defendant failed to transport and deliver said tools according to contract and plaintiffs brought this action in December, 1918, before a justice of the peace, who rendered judgment in favor of the plaintiffs for $200, and defendant appealed. In February, 1919, before the case was tried in the Superior Court, the two boxes of tools were found and delivered to plaintiffs. Though the record states that the judge said that he would allow the plaintiffs to amend, it does not appear that any amendment was made. The jury rendered a verdict for $150 damages for breach of contract and defendant appealed.

J. W. Barbee and Brawley & Gantt for plaintiffs.
Bryant, Brogden & Bryant for defendant.

CLARK, C. J. The Superior Court had plenary power, Revisal, 1476, if amendment had been necessary. The amount of the recovery in the Superior Court was not governed by the judgment rendered by the magistrate. Before the magistrate the judgment for $200 may have been based upon the value of the tools, plus the loss of time directly caused by their nondelivery. On the trial in the Superior Court it may well be that the jury deducted the amount of the value of the tools, which had then been found. At any rate, their verdict was based upon the value of the time lost by the plaintiff until they could find opportunity to purchase new tools after reasonable delay in waiting for them.

The object in sending the tools by express was to secure their prompt and safe delivery. The plaintiffs were entitled to recover as damages for breach of the contract such loss which proximately accrued from the violation of the contract of prompt and safe carriage of the tools, and which could have been reasonably presumed to have been in contemplation of the parties when the contract was made, and as a result of the failure to perform the defendant's part thereof.

The jury trying the case, after the tools had been found, estimated that plaintiffs' damages, in the loss of time and expenses at $150, and there was evidence to authorize such finding. When the plaintiffs delivered the two boxes of tools to the defendant at Lee Hall for transportation (where there was a government camp) they told the agent of the company they wanted them shipped to Norfolk, Va., where there were other camps, and it issued to them a receipt for the two boxes of tools and told the plaintiffs that they would arrive in Norfolk by Monday. The company had all the notice that they could have had had they examined the tools in the boxes. By the exercise of ordinary care the defendant would have known for what purpose these tools were to be used, and are, therefore, responsible for any loss proximately caused by their negligence and delay. *Neal v. Hardware Co.*, 122 N. C., 105; *Lewark v. R. R.*, 137 N. C., 383; *Lumber Co. v. R. R.*, 151 N. C., 25, and cases there cited; *Rawls v. R. R.*, 173 N. C., 8.

There was evidence that the plaintiffs stayed in Norfolk ten days waiting for their tools to come, and that the government required carpenters to furnish their own tools. There was evidence that they were paid by the government when they obtained their tools $8.25 per day, which they lost, and besides they had to pay their board during their enforced idleness. It was in evidence that they were at the expense of a trip home to buy a new set of tools and return. It would seem from this that the jury must have allowed them compensation for about six days loss of time, each, as a reasonable wait for the tools to arrive, and their board, and something possibly for the expense and loss of time returning home to get a new set of tools, and for the loss in having a double set each. These were not items of loss, but for consideration by the jury in estimating the loss.

It is true that it was incumbent upon the plaintiffs to lessen the loss accruing from the negligence of the defendant, and this the jury seems to have considered, and the court so charged.

The plaintiffs could have elected to have brought an action in tort in the Superior Court for a larger amount, or on contract for $200 in the justice's court. *Bowers v. R. R.,* 107 N. C., 722. They elected to bring an action before a justice of the peace for breach of contract. *Froelich v. Express Co.,* 67 N. C., 1.

The amount claimed before the justice was solely for the value of the tools and for loss of compensation for labor which they would have received had the tools been delivered, and for expenses incurred while waiting a reasonable time for the tools before obtaining others.

The tools having been delivered when the trial came on in the Superior Court, the value of the lost tools was omitted in the verdict by the jury, who found $150 a reasonable compensation for the damages sustained by the breach of contract.

It is true that the bill of lading was issued in the name of one of the plaintiffs. But there is evidence that the agent knew that the tools belonged to both the plaintiffs and the bill of lading was therefore to one for himself and as agent for the other. Both are made plaintiffs, and if one of the plaintiffs had been unnecessary this is merely surplusage.

The note on the bill of lading that if the goods were hidden from view the recovery for loss thereof should not exceed $50 is not valid, for a common carrier cannot stipulate against loss by its own negligence. Moreover, such limitation applied only to the value of the tools, and for them no recovery is embraced in this verdict. The verdict covers only the loss of time and expenses not exceeding the loss sustained while waiting a reasonable time for the arrival of the tools.

No error.

EULALIA KIRKPATRICK v. J. M. CRUTCHFIELD.

(Filed 22 October, 1919.)

1. **Trespass—Excessive Force—Livestock—Evidence—Damages.**

   Where the defendant claims that the plaintiff has trespassed upon his lands in tying a cow thereon, and there is evidence that the defendant took the cow from the plaintiff with the use of excessive force, when the cow was not damaging him, it is competent for the plaintiff to show that she had obtained permission of the lessee of the land to tie her cow there, so as to show her good faith in so doing, and an instruction that the defendant was liable in damages if he had used excessive force is a proper one.

2. **Same—Impounding—Resistance.**

   Revisal, sec. 1679, does not authorize the taking up and impounding of livestock unless running at large, and does not apply to cows securely tied to trees under the immediate control of the owner with the permission of the lessee of the land, and it is forcible trespass to take them away over the protest of the owner, to prevent which the owner may use all necessary force, unless the taking is by appropriate legal proceedings.

3. **Trespass — Excessive Force — Personal Injury — Damages — Earning Capacity.**

   Where a personal and permanent injury results from a forcible trespass, incapacity to earn money may be considered as an element of damages.

4. **Instructions—Burden of Proof—Evidence—Greater Weight—Appeal and Error.**

   Held, in this case, an instruction that the burden was on the plaintiff to satisfy the jury by the evidence that her injuries were caused by the wrongful acts of the defendant, is not reversible error to defendant's prejudice because of the failure of the judge to add "by the greater weight of the evidence."

5. **Damages—Personal Injury—Trespass—Evidence—Expectancy of Life.**

   Where there is evidence that a permanent physical injury resulted from a forcible trespass, the expectancy of life of the injured party may be considered upon the question of damages.

6. **Damages—Personal Injury—Permanent Damages.**

   Where a personal injury has been wrongfully inflicted, of a permanent character, the measure of damages is the reasonable present value of the diminution of the earning capacity.

7. **Husband and Wife—Actions—Personal Injury—Statutes.**

   Since the passage of chapter 13, Laws 1913, a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted; in this case, a trespass with the use of excessive force. Revisal, 408 (1).

APPEAL by defendant from *Lyon, J.*, at May Term, 1919, of ALAMANCE.

This was an action by the plaintiff, 33 years old, the mother of two children, and living with her husband, who is not made a party plaintiff. The defendant was living near by and cultivating a crop on lands of the Southern Power Company, which he had leased for one year, and one William Boswell had also rented a portion of this land and was in possession of it. Said Boswell gave permission to the plaintiff to tie her cows there in a place where there was shrubbery and trees, but no crops planted. The defendant came to where the cows were tied, armed with a long whip, and in a rude, angry, and insulting manner, as plaintiff contends, and demanded to know why the cows were tied there. The evidence of the plaintiff was that the defendant knew her husband was not at home; that the defendant became enraged and swore that Boswell had no authority to give her permission, and proceeded to untie a cow when the plaintiff forbade him to do so. But he persisted, and while the plaintiff had hold of one end of the chain the defendant violently snatched it, jerking her down and dragged her upon the ground, inflicting many wounds and bruises upon her; that he then proceeded to untie the other cow, and again, in a violent, angry, and malicious manner jerked the chain from the plaintiff's hands, dragging her 75 feet or more, and in the course of this assault he jerked her through a barbed-wire fence into the public road, tearing her clothes almost off her and terribly wounding her limbs and body. This evidence was corroborated by one Frank Baldwin, and the testimony of the four physicians was that the plaintiff was at that time in a delicate condition and on account of the injuries inflicted upon her she had a miscarriage and was permanently injured and made a nervous wreck for life. The defendant gave a different version.

The jury found, upon the issues submitted, that the defendant wrongfully assaulted and wounded the plaintiff, as alleged in the complaint, and assessed her actual damages at $4,000, and defendant appealed.

Judgment thereon for plaintiff.

W. H. Carroll for plaintiff.
E. W. S. Dameron and John A. Barringer for defendant.

CLARK, C. J. The first four exceptions in the defendant's brief are directed principally to the right of the plaintiff to recover. He contends that the cows were in his lawful possession, being tied on land which he had rented, and that the plaintiff had no right to undertake to prevent his carrying them off, but that she should have resorted to the law to reclaim them. The court charged the jury that the defendant had no right to go there and forcibly take personal property that had been placed there by the defendant, and which were tied and not damage feasant. The jury found the controverted facts with the plaintiff. And, indeed, the court might have instructed the jury that if they believed the testimony of the plaintiff, the defendant, in any event, had used excessive force.

The court properly permitted the plaintiff to testify, as was alleged in the complaint, that she had tied her cows there on permission from William Boswell, who claimed to be in lawful possession, in which she was corroborated by Boswell. Being charged with trespass, she had the right to explain her claim of right and to show her good faith. *Everett v. Smith,* 44 N. C., 303; *S. v. Faggart,* 170 N. C., 741.

The court, also, properly charged the jury that the defendant had no right to impound the cows. Revisal, 1679, authorizes only the taking up of livestock *running at large. S. v. Hunter,* 118 N. C., 1196. The cows, being securely tied to trees, were in the actual possession and under the immediate personal control of the plaintiff and her mother-in-law, and it was a forcible trespass to take them away against their will, they being present and forbidding.

The court, also, properly charged the jury that if the land was in the possession of Boswell, and he had given permission to plaintiff to tie the cows there, the defendant had no right to go there and attempt to remove them forcibly. *S. v. Davenport,* 156 N. C., 602, which holds that the rightful possession "cannot be vindicated by a bludgeon," but must be determined by a resort to legal proceedings.

The court further charged that if the defendant had the right to go there and remove the cattle, he had no right to do so in a forcible manner or commit an assault on plaintiff in doing so. *May v. Telegraph Co.,* 157 N. C., 416. If the defendant was in the rightful possession of the land, but the cows were tied securely to trees and doing no damage, and the owner was present and forbidding him to take the property, the defendant's remedy was by legal action.

The court properly charged the jury: "If you find for a fact that the plaintiff had gotten hold of the chain of the cow; that the defendant jerked her down and dragged her and caused the injury and bruises she has suffered, then he would be liable, and it would be the duty of the jury to answer the first issue 'Yes.'" This was correct. Revisal, 3620, amended by Laws 1911, ch. 193; *S. v. Smith,* 157 N. C., 578. On the other hand, the plaintiff had the legal right to prevent the defendant from taking her property from her forcibly and against her will, if she could, and to use all necessary force for that purpose.

The evidence tended to show that the force used by the defendant was excessive. *S. v. Taylor,* 82 N. C., 554; *S. v. Leggett,* 104 N. C., 784; *S. v. Hemphill,* 162 N. C., 632. The cattle were doing no damage. They were confined and in the actual and peaceable possession of plaintiff and her mother-in-law, and the defendant's action was, as found by the jury, a forcible trespass.

The defendant's assignments of error 7, 8, 9, 10, and 11 are to the charge of the court on the question of damages, but in them we find no error. Exception 7 was that the court allowed as an element of damage a consideration of the plaintiff's capacity to earn money. This Court has repeatedly held that "damages for personal injury include actual expenses for nursing, medical services; also loss of time and of *earning capacity* and mental and physical suffering." *Wallace v. R. R.,* 104 N. C., 442; *Rush v. R. R.,* 149 N. C., 158; *Ridge v. R. R.,* 167 N. C., 510.

The eighth assignment of error is because the judge charged the jury that the burden was upon the plaintiff to satisfy the jury, by the evidence, that her injuries were caused by the wrongful acts of the defendant. It was not reversible error not to add "by the greater weight of evidence." The ninth assignment was to the instruction that the jury "had the right to consider her reduced capacity to make a living." This, taken in connection with the whole charge, was correct. The tenth assignment of error was to the instruction that the jury had "the right to consider her expectancy of life." Where injuries are permanent, as testified to in this case, the charge is unexceptionable. *Ruffin v. R. R.,* 142 N. C., 120; *Clark v. Traction Co.,* 138 N. C., 77.

The eleventh assignment of error is because the judge instructed the jury: "She is entitled to recover the present net value of the difference between what she would have earned and what she has been able to earn in her present condition." In *Johnson v. R. R.,* 163 N. C., 431, the Court held that in an action for personal injuries resulting in diminished earning capacity the measure of damages is not the difference between the probable earnings of the plaintiff before and after the injury, but the reasonable present value of the diminution of his earning capacity, citing *Fry v. R. R.,* 159 N. C., 360.

The twelfth assignment of error is because the court charged the jury that, "The evidence of good character of the plaintiff and defendant and the other witnesses is not substantive evidence, but is corroborative evidence for the purpose of better enabling the jury to pass upon the truthfulness of the witness whose character is proven to be good." This is elementary law in civil actions.

The error most strenuously urged in the defendant's brief is that the plaintiff was not entitled to recover for her injury, but that it was for her husband to bring such action, and defendant's counsel contends that "it is the law in North Carolina that the husband is entitled to the society and to the services of his wife, and, consequently, to the fruits of her industry. She cannot contract or render those services to another without his consent. Those rights were given to the husband because of the obligation imposed by law upon him to provide for her support, and that of her offspring, and the right continues unimpaired so long as the duty continues," citing *Syme v. Riddle*, 88 N. C., 463; *Baker v. Jordan*, 73 N. C., 145; *Hairston v. Glenn*, 120 N. C., 341; *Cunningham v. Cunningham*, 121 N. C., 413; *S. v. Roberson*, 143 N. C., 620. The counsel for the defendant were inadvertent to chapter 13, Laws 1913, which provides as follows: "The earnings of a married woman, by virtue of any contract for her personal services, and any damages for personal injuries, or other tort sustained by her can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried." And Revisal, 408 (1), provides: "When the action concerns her separate property, she (a married woman) may sue alone."

The contention made for the defendant in this case was earnestly presented to the Court in *Price v. Electric Co.*, 160 N. C., 450, better known as "The Washerwoman's case." In that case a washerwoman at Charlotte, carrying her weekly washing home in a cart, was run over and badly injured by the negligence of the conductor in charge of a trolley car. "Her right foot was amputated, her right arm was broken, and permanently rendered stiff, and her head severely gashed." She was confined for several weeks in a hospital, suffering great agony and at considerable expense. "For these injuries and her physical and mental suffering, and for her diminished power to earn wages by reason of injury, the jury assessed the compensation at $5,000. The able counsel for the railroad company strenuously argued that being a married woman, this compensation was the property of her husband and could be recovered only by him, and not by her." Two of the Court were of the opinion that the married woman was entitled to recover her own earnings under the Constitution, which provided that she was entitled to any property "acquired before marriage, or to which, after marriage, she may become in any manner entitled," as fully as if single, and that this was certainly true since the Martin Act of 1911, ch. 109, had given her "the right to contract as if single," and that "for her earnings in occupations elsewhere than in her household duties she had the same right to recover as the husband had to sue for his own earnings, and that, for a stronger reason, damages for injury to her person and for her physical and mental sufferings belonged to her." The counsel for the railroad company cited the cases now relied upon by defendant, and the majority of the Court, in deference to those authorities, felt constrained to hold that the woman could not recover, but as the husband had been made a coplaintiff (though merely as a formality), the Court would not set aside the verdict.

It was felt to be unjust and illogical that the husband should recover for labor which the wife had performed outside the household duties, and under a contract she had a legal right to make "as if single," and that when the wife had borne the physical and mental suffering of the amputation of her foot, and a broken arm and other injuries, compensation therefor should go to her and not to her husband, who had suffered nothing. The discharge of household duties, unending and tiresome and without limitation of hours, the rearing of children, the loving companionship and attentions of a wife are full compensation for her right to support by the husband. Accordingly, at the ensuing term of the Legislature, one of the first statutes passed was chapter 13, Laws 1913, above set out, which has settled the law in this State, in no uncertain terms.

Upon review of all the exceptions and construing the charge of the court as a whole, we find

No error.

ALLEN, J., concurring in result.

MRS. DAISY BLAYLOCK v. SOUTHERN RAILWAY COMPANY.

(Filed 29 October, 1919.)

1. **Carriers of Passengers—Ejection from Train—Tort—Change of Train—Damages.**

A carrier of passengers should stop its train at a station for which a ticket had been sold with assurance by the ticket agent that this particular train would stop there; and upon further evidence tending to show that the train had theretofore stopped at this station, and, *per contra*, that to reach the passenger's destination it was necessary to change cars and that the assurance to the contrary had not been given the passenger, a requested instruction for the defendant directing a verdict on the issue of wrongful ejectment in causing her to change cars, is properly refused, the plaintiff's damage being at least nominal, and such other as was the proximate or the natural result of the tort.

2. **Same—Proximate Cause—Remote Results.**

Where a passenger has purchased a through ticket to her destination and has been wrongfully ejected from the train at an intermediate point to take another of defendant's trains, which would soon have carried her thereto, and instead of availing herself of the comfortable accommodations furnished by the defendant at the transfer point, concluded, without inquiry, to take a trolley car, damages for injuries received on the trolley car, and in consequence of having to walk beyond its line to her destination, are too remote to permit of their recovery.

3. Carriers of Passengers—Damages—Evidence—Negligence—Contributory Negligence.

Where, in a personal injury action, a passenger has a good cause of action for being ejected by the carrier from the train before reaching her destination, so that nominal damages are at least recoverable, her subsequent conduct relating to injuries received by her, when competent, is material on the issue of damages and not on the issue of contributory negligence.

APPEAL by defendant from *Stacy, J.,* at August Term, 1919, of ALAMANCE.

This is an action to recover damages for wrongfully ejecting the plaintiff from the train of the defendant at Greensboro.

The plaintiff alleges that on 22 December, 1917, she went to the station of defendant in Graham, accompanied by two children, one two, and one ten years of age, to go to Terra Cotta on a visit. That she bought one whole and one half ticket, and upon inquiry was informed by the agent that the train she was taking went by Terra Cotta and stopped there. That she got on the train, and when the conductor took up her ticket he told her she would have to get off that train at Greensboro; that it did not stop at Terra Cotta.

The defendant answered and admitted selling the tickets. Denied that its agent told plaintiff that the train she was taking, which passed Graham about 11 a. m., stopped at Terra Cotta. Alleged that said train was not scheduled to, and never had been scheduled to, stop at Terra Cotta.

It averred that train 21, which plaintiff took from Graham, according to its published, advertised schedule, did not stop at Terra Cotta, and that no train that passed Graham did stop at Terra Cotta. That the proper way to go to Terra Cotta was to leave Graham on the train which plaintiff left on, change at Greensboro to a train that left Greensboro about 2 o'clock p. m., and arrived at Terra Cotta about 2:11 p. m. That plaintiff left on the proper train, and that defendant maintained a comfortable station in Greensboro for plaintiff to wait in, and a comfortable train for plaintiff to go to Terra Cotta on, and that these were all in existence and operating on the day plaintiff left Graham.

Defendant further pleaded that plaintiff, by her own conduct brought about any injury which she sustained by reason of exposure because of said street-car trip. That she voluntarily left the station in Greensboro and went to Pomona on a street car, and then walked to her home instead of going on the train upon which she held a ticket, and which was provided by defendant to carry her to Terra Cotta.

Both parties introduced evidence in support of the allegations in the pleadings, and the plaintiff also testified that she had gone to Terra Cotta from Graham before this on the same train, and to her injuries, most of which were sustained by reason of going to Pomona on the street car. The defendant excepted to the evidence of damage after the plaintiff left the train, and also to evidence of the physical condition of the plaintiff at the time of the injury complained of.

The defendant requested the court to charge the jury as follows:

"1. If you find the facts to be as testified to by the witnesses you will answer the first issue 'No.'"

Refused, and defendant excepted.

"2. If you find the facts to be as testified to by witnesses, you will answer the second issue 'Yes.'"

Refused, and the defendant excepted.

"3. If you find from the evidence in this case that plaintiff failed to inquire in the station at Greensboro or from the conductor as to a train leaving Greensboro that would stop at Terra Cotta, and that because of such failure and want of knowledge on her part she took the street car; then any injury she sustained by reason of taking said street car you should not consider as damages sustained by plaintiff because of negligence of defendant."

Refused, and defendant excepted.

The jury returned the following verdict:

"1. Did the defendant company wrongfully eject plaintiff from the train, as alleged in the complaint? 'Yes.'

"2. Did the plaintiff, by her own negligence, contribute to any and all injuries which she sustained? 'No.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? '$950.'"

Judgment for plaintiff, and the defendant appealed.

W. H. Carroll and R. C. Strudwick for plaintiff.
Parker & Long for defendant.

ALLEN, J. Under the authorities in this State it is the duty of a common carrier, receiving a passenger on its trains with a ticket calling for a certain station, and without notice that the train does not stop at that station, to stop the train at the station and permit the passenger to alight. It was so held in *Hutchinson v. R. R.,* 140 N. C., 126, which has been affirmed frequently, notably, in *Elliott v. R. R.,* 166 N. C., 483, in which *Brown, J.,* says: "It is the settled law of this State that where a common carrier receives a passenger upon its train, with a ticket calling for a certain station, it is the duty of the railroad company to stop the train at such station, even though the passenger did not know that this particular train did not stop at such station."

It is also said in the latter case, quoting from Thompson on Carriers, sec. 66: "Carrying a passenger beyond his destination in disregard of his request to be put off there will afford a good ground of action, and this, though no bodily harm, mental suffering, insult, oppression, or pecuniary loss be shown." *Hutchinson v. R. R.,* 140 N. C., 124. And the same principle imposes liability on the carrier for wrongfully failing to carry the passenger to his destination.

It is also held, in *Mace v. R. R.,* 151 N. C., 404; *Norman v. R. R.,* 161 N. C., 338; *Hallman v. R. R.,* 169 N. C., 130; *White v. R. R.,* 172 N. C., 31, that the passenger has the right to rely on the representation made by the agent selling the ticket, and that the carrier is responsible for injuries brought about by his mistake.

The *White case* is strikingly like the case before us. In that case the evidence tended to prove that on 19 November, 1914, the plaintiff, accompanied by her daughter, purchased from the defendant's agent at Mackeys Ferry a ticket to Chapanoke, upon the assurance of the agent that the ticket was good for continuous passage upon the through train of the defendant, which passed Mackeys Ferry about 1 o'clock.

The plaintiff's husband, by arrangement, met this through train at Chapanoke to carry his wife to their home, some distance in the country. As the plaintiff did not arrive on this train, the husband returned home. When this train of the defendant, which runs from New Bern to Norfolk and passes Mackeys Ferry, arrived at Edenton, the conductor for the first time informed her that this train did not stop at Chapanoke, and told the plaintiff that if she did not get off at Edenton he would carry her on to some other point.

Plaintiff was compelled to get off at Edenton and take the next train, an hour or more later, which was a local train and stopped at Chapanoke. When she arrived at Chapanoke her husband had gone home. It was a rainy, blustery day, and plaintiff was subjected to much inconvenience by reason of having to change trains at Edenton. The court overruled a motion to nonsuit, and said: "The plaintiff had the right to rely upon the assurance of the agent that the train which she took at Mackeys Ferry would stop at Chapanoke to put her off. It was the duty of the agent, when he sold a ticket to Chapanoke, to inform the plaintiff that she would have to take a local train at Edenton, and would arrive at Chapanoke some time after the other train had passed. Upon the assurance of the defendant's agent, the plaintiff had reason to believe that she would meet her husband there to take her and her little daughter to their home. *Hutchinson v. R. R.,* 140 N. C., 125, and cases cited."

The plaintiff brings her case well within these principles, as her evidence is to the effect that she went to the station of the defendant at Graham on 22 December, 1917, with two small children; that she purchased tickets for Terra Cotta, and was told by the agent the train she was about to take stopped at Terra Cotta; that she had gone on the same train before, and it stopped at this place; that the conductor told her the train did not stop at Terra Cotta and required her to leave the train at Greensboro; that the train did not stop at Terra Cotta that day; that her mother was at the station to meet her; that she suffered serious injury, and as we can consider only the evidence favorable to the plaintiff on a motion for judgment of nonsuit or on an exception to the refusal to direct the jury to answer the first issue "No," if they believe the evidence, there is no error in the failure to give the first instruction prayed for.

And the same result follows as to the prayer on the issue of contributory negligence, because the jury having found the facts according to the contentions of the plaintiff, her cause of action was complete when she was required to leave the train at Greensboro, and she then had the right to recover at lease nominal damages, and up to that time there is neither allegation nor proof of contributory negligence.

If she had a good cause of action, entitling her to nominal damages, when she left the train, her subsequent conduct in going on the street car is material on the issue of damages and not on the issue of contributory negligence.

The evidence of the plaintiff as to the condition of her health at the time of the injury complained of, and subsequent thereto, was competent on the issue of damages.

The other exceptions to evidence and to the failure to give certain instructions are to the refusal to eliminate the injuries sustained by the plaintiff by reason of going to Pomona on the street car from the issue of damages, and in this respect we are of opinion there is error.

"In torts the damages must be the legal and natural consequences of the wrongful act, and such as, according to common experience and the usual course of events, might have been reasonably anticipated.

"If the cause is remote in efficiency and does not naturally result from the tort, it will not be considered as proximate. To be such it must be 'a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.' *Ramsbottom v. R. R.*, 138 N. C., 42; *Brewster v. Elizabeth City,* 137 N. C., 392." *Garland v. R. R.,* 172 N. C., 639.

Following this rule it has been held that damages were too remote, and could not be recovered for exposure and injuries caused by walking from Toecane to Bakesville when there had been negligence in transmitting a telegram requiring a car to meet the plaintiff at Toecane (*Young v. Tel. Co.,* 168 N. C., 36); for exposure in a storm while walking from

Toecane to her home, the defendant having negligently carried her beyond her station (*Garland v. R. R.*, 172 N. C., 638); for injuries sustained by falling in a cattle guard while walking from Minneapolis to Cranberry, there being evidence that the defendant negligently failed to stop its train for the plaintiff at Minneapolis when signaled to do so (*Brown v. R. R.*, 174 N. C., 694).

These authorities are cited and approved in *Johnson v. Tel. Co.*, 177 N. C., 31, in which the plaintiff sued to recover damages for negligence in the delivery of a telegram, and as a part of his damage alleged injuries sustained while riding on a freight train and when walking from Dillsboro to Franklin, and the Court, in denying a recovery for these injuries, said: "Without going into the details of the injuries and sufferings endured by the plaintiff on the freight train, and in attempting to walk from Dillsboro to Franklin, it is sufficient to say that in no sense can the delay in the delivery of the telegram be deemed a proximate cause of such injuries. . . . The defendant could not have foreseen, or contemplated, that if the message was not delivered the plaintiff would seek transportation by freight, nor that he would be roughly handled on such trip. Still less could the defendant be responsible for the plaintiff undertaking to walk from Dillsboro to Franklin. . . . Both these grounds of alleged damage are too remote and speculative. It is a settled principle that the law looks to the immediate and not the remote cause of damage, the maxim being, '*Causa proxima, sed non remota, spectatur.*' The cause of the damage on the freight train was the negligence of the carrier either in the handling of its train or in the defective condition of its roadbed or equipment. The cause of the over fatigue in attempting to walk out from Dillsboro was the mountainous road and the lack of physical strength in the plaintiff to endure the fatigue, and still more, his own bad judgment in attempting to walk so long a distance."

The plaintiff reached Greensboro about 12 o'clock and left the train at the depot, where there was a waiting room. A local train of the defendant left this depot at 2 o'clock, and if she had taken it, she would have reached Terra Cotta about 2:11 o'clock; but, instead of waiting, and without making inquiry of any one, she took a street car for Pomona, one-fourth mile from Terra Cotta, which she reached about 2:30 o'clock, and it is for injuries on the street car, and while walking from Pomona, she asks a recovery. They are too remote and could not have been foreseen or anticipated.

New trial.

GEORGE LAWS, EXECUTOR, ET AL., v. BEATRICE CHRISTMAS ET AL.

(Filed 29 October, 1919.)

1. Wills—Interpretation—Intent—Precatory Words.

Words in a will which, standing alone, may be construed as precatory and not binding, contrary to the will or desire of the person designated, will be construed as imperative upon him when by a proper interpretation of the entire instrument the testator's intent appears that they should be so.

2. Same—Testacy—Presumptions—Trusts—Uses.

A testatrix used in her will the word "give" in the disposition of certain personalty, and the same word in regard to a house and lot to her sister, also to her "all the money I have in bank at my death; I want her well provided for a good sum and board." Also, after the death of the sister, "I want my house and lot to be sold, the money put in bank to go to her husband for the education of his children." *Held*, the intent of the testator in the use of the word "want" was that it should be imperative, which would avoid the presumption against intestacy, the husband to use the proceeds of the sale of the house and lot, in the bank, as trustee, for the declared purpose of the testatrix, that it should be used for the education of his children.

3. Wills—Trusts—Funds—Payment to Clerk—Receivers—Parent and Child.

Where the testatrix has devised to the husband of her sister the proceeds of sale of a certain house and lot to be placed in bank for the education of his children, and it appears from his own allegation that he cannot give bond for the protection of the *cestuis que trustent*, whom he has not seen for a period of years and against whose interest he has claimed, it is proper for the court to see that the funds are secured for the purposes intended, in this case by payment thereof into the hands of the clerk of the Superior Court as receiver.

APPEAL by plaintiff from *Stacy, J.*, at the September Term, 1919, of ORANGE.

This is an action by the executor of Louisa Frye and R. L. Christmas against the children of the said Christmas to obtain a construction of the will of the said Frye, and to determine the rights in the proceeds of the sale of a certain lot of land.

The will is in the following words: "I, Louise Frye, being of sound mind and memory, do make this, my last will and testament, as follows: I desire my body to be decently buried in the new cemetery plot on the south side, designated by Mr. George Laws, who will attend to my burial, and for his services and furnishing the coffin I give to him my gold watch, now in his possession. I give to my sister, Eliza Christmas, the following household articles to be sold: 1 bureau, 1 sideboard, 1 stove, 1 new feather-bed, and pillow of down.

"I also give to my sister, Eliza Christmas, my house and lot, at depot, during her lifetime; I also give my sister Eliza all the money I should have in bank at my death. I want her well provided for a good sum and board.

"After my sister Eliza's death, I want my house and lot to be sold, the money to be put in bank to go to Robert L. Christmas, and used for the education of his children. I appoint Mr. George Laws executor to this my last will and testament.

"Witness my hand and seal, this 26 June, 1906.

LOUISA FRYE. (Seal.)"

In 1909, about three years after the death of the testatrix, the plaintiff, R. L. Christmas, separated from his wife and children, and he has not seen his children since then, and does not know where they are. The wife of R. L. Christmas is dead.

The lot referred to in the will has been sold, and the controversy is over the proceeds of the sale, R. L. Christmas contending that the proceeds of sale are given to him in the will, and the defendants that a trust is declared in their favor.

His Honor rendered judgment holding that there was a trust in favor of the defendants, and as the plaintiff Christmas was unable to give a sufficient bond for the security of the funds, he ordered that it be paid to the clerk of the Superior Court of Orange County as the receiver for the defendants, and the plaintiff excepted and appealed.

T. C. Carter for plaintiff.

A. H. Graham and John W. Graham for defendant.

ALLEN, J. The words which give rise to the present controversy are "want" and "used for the education of his children," the plaintiff, R. L. Christmas, contending that there was an absolute gift of the money to him when the testatrix said "to go to R. L. Christmas," and that the word "want" is precatory and merely expressive of a desire or wish, while the defendants, his children, insist that a trust is declared in their favor.

The first difficulty in the way of the position taken by the plaintiff is that it proves too much, since it is not reasonable to hold that the word "want" relates to the sale of the lot, and then, passing over two dispositions of the property, say it affects the provision for the education of the children, without also holding that it pervades the whole item, giving character to each provision, so that the will would read, "I want my house and lot to be sold;" "I want the money to be put in bank;" "I want it to go to Robert L. Christmas;" "I want it to be used for the education of his children," and under this construction, if held to be precatory and not imperative, no one would take anything under the item of the will, and the testatrix would be intestate as to the remainder in fee in the lot, which is contrary to the presumption that "every testator, is presumed to intend to dispose of all his estate, so as not to die intestate as to any part" (*Foust v. Ireland,* 46 N. C., 187; *Foil v. Newsome,* 138 N. C., 119), and to the language of the will, which manifests a purpose to make some disposition of the property.

Why mention it at all if she did not intend to create some right or impose some duty in regard to it?

The fact that she refers to it shows that she had the remainder interest in mind, and it is reasonable to conclude she would have remained silent if she did not intend to devise it.

We cannot adopt this view of the plaintiff, and, as it appears to us, but one of two constructions is permissible.

The testatrix either intended to express the wish that the lot be sold, and to make explicit disposition of the fund, in which event the word "want" would only refer to the sale of the lot, or that the whole devise or bequest should be imperative although precatory words were used.

The effect of precatory words in a will has been considered in several recent decisions, and while the older English doctrine that "whenever property was given, coupled with expressions of request, hope, desire, or recommendation, that the person to whom it is given will use or dispose of the same for the benefit of another, the donee will be considered a trustee for the purpose indicated by the donor," has not been followed, the principle is recognized in all that, although in form precatory, the language will be held to be imperative and to impose a trust if the intent clearly appears. *Carter v. Strickland,* 165 N. C., 70; *Hardy v. Hardy,* 174 N. C., 507.

The Wisconsin Court states the controlling principles, in *Knox v. Knox,* 59 Wis., 172, as follows:

"First. 'It is not necessary that technical language should be used to create a trust. It is enough that the intention is apparent.' 1 Jarm. Wills (5th ed.), 385, and note.

"Second. 'That precatory words used in a will—that is, words of recommendation, entreaty, requests, wish, or expectation, addressed to a devisee or legatee, may be sufficient to create a trust in favor of the person or persons in whose favor such expressions are used.' 1 Jarm. Wills (5th ed.), 385; Lewin Trusts, 118; 2 Story Eq. Jur., par. 1068, 1068a; Hill Trustees, 71; 2 Redf. Wills, 410, 411.

"Third. In order to determine whether precatory words in a will create a binding trust, 'the real question always is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.' 2 Redf. Wills, 416; *Williams v. Williams,* 1 Sim. (N. S.), 358; Hill Trustees, 114; 2 Story Eq. Jur. (12th ed.), par. 1068b, and cases cited.

"Fourth. In determining that precatory words in a will create a trust the courts give great weight to the fact that the person or object to which the precatory words apply is clearly pointed out, and the quantum of the estate to be given to such person or object is also clearly defined. 1 Jarm. Wills, 396; 2 Redf. Wills, 416; 2 Story Eq. Jur., par. 1070, 1071."

Here we have the persons clearly pointed out, if the precatory words apply to the provision for the children, the quantum of the estate given is clearly defined, and that the testatrix intended to control the fund appears from the entire absence of words of discretion in connection with the gift to the plaintiff, and that he takes it for a specific purpose.

The testatrix gave the lot to her sister for life, the remainder in fee is not referred to except in the item before us; there is no reason for mentioning it except to dispose of it, and, in our opinion, the language used is sufficient to authorize a sale and to dispose of the proceeds.

Does it impress the fund with a trust in favor of the children?

"It must be conceded that it is not necessary for the valid declaration of a trust that any peculiar language be used" (*St. James v. Bagley,* 138 N. C., 398). "The intent is what the Court looks to." *Blackburn v. Blackburn,* 109 N. C., 489.

"No technical language, however, is necessary in the creation of a trust, either by deed or will. It is not necessary to use the words 'upon trust' or 'trustee,' if the creation of a trust is otherwise sufficiently evident. If it appears to be the intention of the parties from the whole instrument creating it that the property is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title if it is capable of lawful enforcement." *Colton v. Colton,* 127 U. S., 310.

"It is sufficient if the language used shows the intention to create a trust, clearly points out the property, the disposition to be made of it, and the beneficiary." *Witherington v. Herring,* 140 N. C., 497.

All of these requirements are present if the intent of the testatrix is made manifest.

It is significant that the testatrix required the money "to be put in bank," instead of giving it to the plaintiff, which would have been the natural course if she had intended him to have the beneficial interest. It is also worthy of note that in the preceding parts of the will she uses the terms "I give" four times, showing she knew what it meant, and particularly in connection with the gift of the money in the bank at the time of her death, but when she makes disposition of the proceeds of the sale of the lot in bank, this is "to go to" the plaintiff, which is less certain, and at least ambiguous.

And it is to go to him coupled with the purpose in the mind of the testatrix, "and used for the education of his children."

Use and trust are in many respects synonymous, and when property is given to be used for a particular person it would require great refinement to distinguish this from a gift to his use, in trust for him, or for his benefit.

In *Jarrell v. Dyer,* 170 N. C., 178, the language in the will was: "I, Emma J. Simmons, being of sound mind, do hereby will and bequeath to my mother, Pauline E. Jarrell, all the property recently deeded to me by her; also all my other property, that she may administer it to the use of my children," and the Court said of this provision: "The testatrix evidently bequeathed to her mother all of her property, including that which had been conveyed to her by her mother, as well as that which she derived from other sources, in trust, that the mother may use, control and administer it for the benefit of the testatrix's children."

We cannot think the construction would have been changed if the testatrix had said "for the use of my children" or "to be used for them."

We are, therefore, of opinion a trust is declared in favor of the children, and, if so, the court had the right, and it was its duty, to see that the fund was secured, as it did by its order, as the plaintiff was unable to give bond, had not seen his children for ten years, and does not know where they are, and says, in his complaint, "that under any circumstances it will be impossible at this time for him to carry out the wish and even a trust, if the court should decide that he was a trustee."

"Under the old equity system the chancellor had power to order one who held the legal title, in trust for another, to execute a deed. So he had power to order a defendant, who held a fund in trust, whether it consisted of bonds or of money, to pay 'the fund' into court, to the end that the fund should be put under the protection of the court. This power the court still has under the new system in all cases where there is the relation of trustee and *cestui que trust,* and the land or the fund is, in contemplation of a court of equity, *the property* of the plaintiff in an action brought to enforce the equity, and an order made for the execution of a deed or the payment of the fund into court is a lawful order." *Daniel v. Owen,* 72 N. C., 342.

Affirmed.

SALLIE SPRUILL v. J. F. DAVENPORT ET. AL.

(Filed 22 October, 1919.)

1. **Schools— Contracts— Employment — Committee — Individual Liability—Damages—Fraud—Issues.**

The members of a committee of a public school district in the employment of teachers therefor, etc., are public officers when acting in discharge of their duties, and are not personally liable in damages for their acts unless such are done by them corruptly or with malice; and an issue submitted as to their personal liability, which is only directed to whether their removal of a teacher is wrongful, is insufficient to warrant a judgment, and reversible error on defendant's appeal.

2. **Same—Teachers—Contracts—Legal Appointment.**

It is the duty of the committee of a school district, under the statute, to dismiss a teacher of the public schools therein who has not been legally appointed, according to the statute, and no damages are recoverable against the individual members when in the exercise of this rightful power they act accordingly, whether their motives were bad or otherwise.

3. **Statutes—Interpretation—Mandatory—Schools— Teachers— Employment—Dismissal—Damages.**

The provisions of Pell's Revisal, sec. 4161, that the county board of education fix annually a day and place for the meeting for the township or district committeemen to be in conference with the county superintendent to select a teacher from applications previously filed, and that the election of a teacher will not be valid without the approval of the county superintendent, who shall not sign a voucher for the salary of a teacher unless he has received satisfactory evidence of the election of such applicant, or a copy of the contract required to be filed with him, as required, are mandatory and necessary to have been complied with in order to make the appointment a lawful one.

4. **Statutes—Interpretation—Intent—Mandatory—Directory.**

While there is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory, the intent and meaning of the Legislature will control, as ascertained from the phraseology of the statute, considering its nature, design, and the consequences that would follow a noncompliance with it.

CIVIL ACTION, tried before *Devin, J.*, and a jury, at July Term, 1919, of WASHINGTON.

The plaintiff sued for damages, alleging that she had been employed as a teacher in Cherry School District, and that after she had served for less than a month she was dismissed by the defendants, members of the school committee. She asks judgment for $360, her salary for the full term of nine months, at $40 per month. It being discovered that the complaint stated no cause of action, there being no allegation of fraud or malice, the plaintiff, by leave of the court, amended her pleadings, and further alleged that she was willfully and maliciously dismissed by the defendants, as school committeemen. The court submitted the following issues:

"1. Did the defendants wrongfully remove the plaintiff and prevent her from teaching the school at Cherry?

"2. If so, what damage, if any, is the plaintiff entitled to recover therefor?"

The jury answered the first issue, "Yes," and the second issue, "$280, with interest." Upon this verdict the court rendered a personal judgment against the defendants, and not a judgment against them as school committeemen in their corporate capacity.

Defendants appealed.

Zeb Vance Norman for plaintiff.
Ward & Grimes for defendants.

WALKER, J. The first issue was not in proper form. A public officer is not personally liable in damages for an act done in the line of his duty. *Robinson v. Howard,* 84 N. C., 152. There it was held that a school committeeman was not liable personally on a contract by which he employed a teacher, and that the remedy was by mandamus to compel the payment of the money by the proper officer in the way provided by law. If, though the act is wrongful and malicious, an action will lie against the officer in his personal capacity to recover damages for the wrong committed by him. "It is a principle well established, that when a person, corporation, or individual is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another; for, though the damage done is undoubted, no legal right of another is invaded, and hence it is said to be *damnum absque injuria. Dewey v. R. R.,* 142 N. C., 392; *Thomason v. R. R.* (plaintiff's appeal), 142 N. C., 318; *Oglesby v. Attrill,* 105 U. S., 605. In such cases the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry." *White v. Kincaid,* 149 N. C., 416, 419. It was said in *Hipp v. Ferrall,* 173 N. C., 167, 169, to be the law of this State, "that public officers, in the performance of their official and governmental duties involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly or with malice," citing *Templeton v. Beard,* 159 N. C., 63, and *Baker v. State,* 27 Ind., 485. See, also, *Scott v. Fishblate,* 117 N. C., 265; *Burton v. Fulton,* 49 Pa. St., 151; *Stewart v. Southard,* 17 Ohio St., 402; *Reed v. Conway,* 20 Mo., 22; *Donahoe v. Richards,* 38 Me., 379; *Jenkins v. Waldron,* 11 Johns. (N. Y.), 114; *Harmon v. Tappenden,* 1 East, 563; *Cullen v. Morris,* 2 Stark, 577. The law does not inquire into the wisdom or expediency of the official act. *Oglesby v. Attrill,* *supra.* That is committed to the sound judgment and discretion of the officer, and it is only when he goes outside of his line of duty and acts, as is said in *Hipp v. Ferrall, supra,* "corruptly or with malice," that he becomes liable for the consequent damages.

The defendants contend, on this ground, that the issue is not sufficient in form to sustain the judgment, as it does not appear therefrom that the dismissal was caused by either corruption or malice. It might have been "wrongful," if there was a mere breach of contract, but this would confine liability to the school district or to the board in its corporate character, and it would not extend to the individual members. More must appear to make them liable. *Morrison v. McFarland,* 51 Ind., 206; *Adams v. Thomas,* 12 N. W., 940. The case of *Robinson v. Howard, supra,* is of a like kind. The issue, as framed, was not, therefore, sufficient as a basis for the judgment, as it should have included the element of malice or corruption. *Ruffin v. Garrett,* 174 N. C., 134. The passage quoted by plaintiff's counsel from 35 Cyc., 1095, does not sustain the position that the members of the board are liable individually. It says: "Where a school teacher is wrongfully removed or dismissed before the expiration of his term of employment, he is entitled to recover from the school district, or the school board, the damage he has sustained by reason of the breach of his contract, as where he is dismissed without a sufficient cause, or without the cause of his dismissal being ascertained and shown in the manner prescribed by statute, as without a hearing." It is apparent what is meant, and that the author is referring to corporate liability. This is made perfectly clear by this statement of the law, almost immediately following the other one in the same paragraph: "Where the violation of a contract is by the school officers in their official capacity, they are not personally and individually liable therefor, unless they act maliciously," citing *Morrison v. McFarland, supra; Gregory v. Small,* 39 Ohio St., 346; *Burton v. Fulton,* 49 Pa. St., 151; *Adams v. Thomas, supra,* and these cases fully support the text. It is well settled that while issues are sufficient, if they present the material matters in dispute and afford each of the parties a fair and reasonable opportunity to develop his case to the jury, they must always be so framed and answered as to warrant the judgment. *Hatcher v. Dabbs,* 133 N. C., 239; *Strauss v. Wilmington,* 129 N. C., 99. The defect in the issue would involve a new trial, as no malice or corruption is found. The charge of the court is not in the record.

But there is another obstacle in the plaintiff's way and fatal to her recovery. If she was not properly and legally appointed to the position of teacher in the Cherry school, it was not only the right, and within the power, of the committee to dismiss, but it was their official duty to do so, and if they were exercising a rightful power, their motive, even if a bad one, cannot be considered, as we have shown heretofore. It is, then, a correct position, that if she was not legally appointed, or "elected," it is a full answer to her action for damages against the individuals of the board, as the dismissal was not, in any sense, a wrongful one, but, instead, was a proper thing done "in the line of their duty." This very question was before the Court in *Gregory v. Small,* 39 Ohio St., 346, 348, which we have already cited for another purpose. The Court there held: "If there was not a legal contract of employment, the teacher had no right to teach the public school, and the directors, in their official capacity, might dismiss him, and put a teacher duly employed in possession of the schoolhouse. The common-law right of action for dismissal is founded on a valid contract of employment. When an officer acts within the scope of his authority, he is not responsible personally, unless he acts from a corrupt motive," citing *Stewart v. Southard,* 17 Ohio St., 402; *Ramsey v. Riley,* 13 Ohio, 137; *Morrison v. McFarland,* 51 Ind., 208. We must now turn to the record in this case, and to the statute of our State regulating such matters, and see whether the plaintiff was regularly and legally appointed as a teacher in the Cherry school. We will first consider the statute, as it will be convenient to do so. It will be found in Gregory's Suppl. to Pell's Revisal, vol. 3, pp. 665 and 666, sec. 4161. It confers authority to employ and dismiss teachers, and then provides, as follows: "The county board of education of each county shall fix annually a day and place in each township for the meeting of the township or district committeemen of said township, who shall, in conference with the county superintendent, with whom application must have previously been filed by all applicants, select the teachers for their respective schools, except for rural public high schools: *Provided,* that no election of any teacher or of any assistant teacher shall be deemed valid until such election has been approved by the county superintendent; and no voucher for the salary of a teacher of any school shall be signed by any county superintendent unless a copy of such teacher's contract has been filed with him as herein provided, and unless he shall have received satisfactory evidence that such teacher has been elected in *strict* accordance with this section." We have quoted only the material portion of the law. It will be observed that it requires notice of the meeting, appointment of day and place by the county board of education for the meeting of the township or district committee, who shall, *in conference* with the county superintendent, select teachers for their respective schools from the list of applications required to be previously filed with the county superintendent by *all* applicants. When we turn to the record we find that, so far as appears, not one of these requirements has been complied with. The statute also declares that no election shall be deemed valid unless approved by the county superintendent. This approval was not given. It goes further, and directs that no voucher for salary shall be given to any teacher unless the superintendent is satisfied, by evidence, that such teacher has been elected in *strict* accordance with this section. It appears, therefore, very clearly, that these provisions, so carefully and guardedly drawn, were not intended to be merely directory or optional, but mandatory, for the statute not only prescribes the procedure, in no uncertain terms, but expressly declares that a departure from it shall render the election void and of no effect. A very good statement of the rule as to what statutory provisions are mandatory, and require strict obedience, and what are only directory, and do not affect the validity of what is done, will be found in 36 Cyc., at pp. 1158 and 1159. It is there said: "When a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory. When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative or exclusive terms, either expressed or implied, then such negative or exclusive terms clearly indicate a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the manner prescribed." It is dangerous to attempt to be wiser than the law, and when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted. Approving this view, a standard author has said: "A judge should rarely take upon himself to say that what the Legislature have required is unnecessary. He may not see the necessity for it; still it is not safe to assume that the Legislature did not have a reason for it; perhaps it only aimed at certainty and uniformity. In that case, the judge cannot interfere to defeat that object, however puerile it may appear. It is admitted that there are cases where the requirements may be deemed directory. But it may safely be affirmed that it can never be where the act, or the omission of it, can by any possibility work advantage or injury, however slight, to any one affected by it. In such case, the requirement of the statute can never be dispensed with." Black's Interpretation of Laws (1896), at pp. 337, 338. There is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory. The meaning and intention of the Legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. Black's Interpretation of Laws, p. 338 (124). But, in our case, the meaning and intention of the Legislature are expressed with perfect clearness. No provision, it would seem, could be more mandatory, in form or substance, than one which declares that noncompliance with it shall make void the act of the body required to observe its requirements.

And, too, it may be said, on the question of damage, that the plaintiff's claim is based upon the loss of her salary for the school term of seven months, and she actually recovered two hundred and eighty dollars predicated upon that theory. But the statute expressly and positively forbids the payment of any part of the salary, unless a copy of the contract with her has been filed with the superintendent, accompanied by evidence that the person so applying for a voucher has been duly and regularly elected—in *strict* accordance with the provisions of the statute. This was not done, and it is a condition precedent to the right of compensation. She has, therefore, shown no damage, as there was no loss of anything to which she was lawfully entitled.

There is no allegation of fraud in this case, or any proof of the same. Plaintiff is presumed to know the law, and should have ascertained if her election was legal, and her evidence shows that she did know that the concurrence and approval of the superintendent was essential to a valid appointment of her as a teacher. Parties must keep within the law, when making their contracts. This view is sustained by *Wright v. Kinney*, 123 N. C., 619, though our case is stronger for defendant here. We mention this matter, though not strictly necessary to do so in order to decide the case.

We are, therefore, of the opinion that as the plaintiff was not legally elected as a teacher of the Cherry school, it was proper for the committee to dismiss her or to refuse permission that she should longer teach in the school, and that consequently the defendants have committed no act or actionable wrong, for which the plaintiff can sue. It is, therefore, ordered that the judgment be reversed and the action dismissed as upon nonsuit.

Reversed.

CARRIE W. SMITH ET AL. v. ROGER MOORE ET AL.

(Filed 22 October, 1919.)

1. **Estates—Limitations—Contingencies—Remainder—Title—Deeds and Conveyances—Wills.**

A devise of the testator's estate to her two daughters, C. and J., and if J. should die without making a will, disposing of her share, or without children, her portion to C., or the children of C., if she be dead; at the death of C. her portion to go to her children; the estate of J. is in fee, defeasible upon her dying without children, with the further provision that, upon her so dying, to her sister, C., and should the sister be then dead, to her sister's children; C. taking a life estate with remainder to her children. Hence, a deed of the entire estate from both C. and J. would not convey the fee-simple, absolute title to the lands.

2. **Wills—Powers—Sales—Deeds and Conveyances—Estoppel.**

A devise of an estate with contingent limitations over, giving the first taker the power to dispose of the lands by will: *Held*, her deed would estop those thereafter claiming title under her.

3. **Wills—Interpretation— Reconcilable Provisions— Estates— Limitations—Remainders—Contingencies.**

A devise of an estate to be equally divided between the testator's two daughters is not irreconcilable with the interpretation of the will as a whole that one of them takes a life estate, remainder to her children, and the other an estate with contingent limitations over; and, where this appears, the doctrine that the last clause of the will takes precedence over those before it in the instrument, where the language is ambiguous, does not apply, but the intention is to be ascertained by a fair and reasonable consideration of the entire instrument.

4. **Wills—Devises—Purchasers—Rule in Shelley's Case—Indefinite Succession.**

Under a devise to the daughter of the testator for life, remainder to her children, and to another daughter with contingent remainder to the children of her sister, the intent of the testator will be construed that the grandchildren shall take under the will as purchasers, and not that the mother should take a fee-simple absolute, so that the children would take from her, at her death, in the quality or character of heirs, or heirs of her body, as a class, indefinitely, in succession; and the rule in *Shelley's case* will not apply.

5. **Estate—Wills—Children—Presumptions—Issue.**

Where there is a devise of an estate to the testator's two daughters, still living, with limitation over, on the contingency of their having children, etc., the law does not presume that the possibility of issue is extinct.

CIVIL ACTION, tried before *Calvert, J.*, at June Term, 1919, of NEW HANOVER.

It appears that the plaintiff, Carrie W. Smith (wife of Herbert Smith), and Janie H. Strange, who are the children of the late Mrs.

Bettie Andrews Atkinson, have contracted to sell and convey to the defendant, Roger Moore, a certain lot of land on Market Street, in the city of Wilmington, and to convey to him a good and indefeasible title thereto in fee by deed sufficient for the purpose, and the said Moore promised to pay therefor the sum of five hundred dollars. Plaintiffs tendered a deed for the lot to Mr. Moore, and he refused to accept it, upon the ground that the plaintiffs could not convey to him thereby a good title in fee, because they did not acquire such a title by the will of their mother, the material portion of which reads, as follows: "I give and bequeath my estate, to be equally divided between my two daughters, Carrie W. Smith and Janie H. Strange, but if Janie should die without making a will or without a child or children, then her portion of my estate shall go to Carrie, or the surviving sister, or to her children if Carrie is dead. She, Janie, is privileged to make a will and leave the estate to whom she will. I wish, at the death of Carrie W. Smith, her portion of my estate to go to her children. If my dear husband should be living when I die I wish him to have my home (corner Fifth and Dock streets, Wilmington, N. C.), as long as he lives, and at his death to be divided between my two daughters, Carrie W. Smith and Janie H. Strange. My daughter, Janie H. Strange, I give my interest in the Front Street house we bought together some time ago. That is to be taken out before the estate is divided. My stock and real estate I wish divided between my two daughters." The will was duly admitted to probate after the death of Mrs. Atkinson (formerly Mrs. Strange).

The judge was of the opinion, and so held, that the plaintiffs could convey a good title by their deed, and rendered judgment accordingly, and the defendant, Roger Moore, appealed.

A. G. Ricaud for plaintiffs.
No counsel for defendants.

WALKER, J. We always regret to disagree with the lower court, and especially when our inclination is to concur with it and unfetter titles, so that land may be kept in the channels of commerce. But we must, of course, follow the law and be governed by its principles. In construing this will, we must search for the intention of the testator and execute her wish as we may discover it to be, if it is not contrary to law, but is a valid one, which is the case here. So the only question is the true meaning and legal effect of the will.

The devise was made contingent by the first clause. It is true that the real property is given to the daughters, to be equally divided between them, but it is further provided that if Janie should die without leaving a will, and without a child, or children, then her portion of the estate shall go to Mrs. Smith, her surviving sister, or to her children, if she is dead. Miss Janie took, under this clause, a defeasible fee, the contingency being that she dies without child or children, and without having left a will, but there is a further contingency, that, in that event, it shall go to Mrs. Smith, if living at Miss Janie's death, and if not, then to her children. Of course, the fact of her leaving a will would not be material, because, if she did so, the party claiming under her would be bound or estopped by this deed in which she joins. The further contingency just mentioned arises if she does not leave a will, when, at her death, the estate will go to her sister, or if she be dead at the time, then to her children. If Miss Janie does not marry, or dies without children, if she does marry, and leaves no will, it cannot be determined at this time who will be the children of Carrie, if the latter has died before her sister. All of her present children may be dead at that time, and other children, not now living, may be *in esse,* and they have not, and of course could not, have signed the contract. Besides, one of her living children is a minor and cannot convey an indefeasible title, and is not a party to the contract, if he could be, so as to bind himself irrevocably. His guardian does not profess, in his answer, to surrender any of his rights, but submits the matter to the court to determine what they are and to adjudge accordingly.

But there is another question. The plaintiffs' counsel seems to concede that if Mrs. Carry Smith acquired only a life estate in her mother's land by the will, that the plaintiffs cannot comply with their contract and pass a good title by their deed. It is argued with much ability, and plausibility, that by a survey of the entire will it appears that Mrs. Atkinson's purpose was to give to her two daughters a *fee simple absolute* in her real estate, to be held and enjoyed by them as tenants in common, share and share alike, and this deduction is drawn from the first words, and the last words, in the will, where it is said she devises it to them without qualification, and that the clause, "I wish, at the death of Carrie W. Smith, her portion of my estate to go to her children," should not be allowed the effect to change the manifest intention, which is to be drawn from the other language just referred to. But the trouble with this argument is that she qualified the gift, as expressed in the first part of the will by the contingent clause which follows it, and by which she limits Miss Janie's share over to her sister, or to her sister's children if she be dead. The clause just quoted above intervenes the first and last clauses of limitation, and, as we are bound to hold, clearly and unequivocally gives Mrs. Smith a life estate, with remainder to her children at her death. But neither the last nor the first clause is necessarily inconsistent with the creation of this life estate. The property is still divided "between the daughters," though one may take a life estate with remainder to her children, and the other a defeasible fee. At least, they are not in such irreconcilable conflict as to bring the case within the rule of construction relied on by plaintiffs' counsel, that the last clause takes precedence over those before it in the instrument.

Plaintiffs' counsel cites *Taylor v. Brown,* 165 N. C., 157, as an authority to support the rule just mentioned, and to show its application to our case. But a careful reading and consideration of that decision will show that it does not sustain the contention of plaintiffs, but rather tends the other way. The Court there said: "If Elizabeth Taylor did not take a fee simple, the limitation over vested the title, at her death, in the children of the testator under the fourth paragraph of her will. It is elementary that a will must be so construed as to effectuate the evident intent of the testator. *Lynch v. Melton,* 150 N. C., 595; 27 L. N. S., 773; *Fellowes v. Durfey,* 163 N. C., 305. The primary purpose is to ascertain the intention of the testator from the language used by him, taking the will as a whole, and not separate parts of it. It is manifest from the context of this will that the testator did not intend to give his wife an absolute estate in his lands under the first clause of his will; otherwise, the words used in the fourth clause would be meaningless and unnecessary. It is the duty of the courts in construing a will to give effect to every part of it, if possible. The testator's children were evidently in his mind when he made his will, and were as much the objects of his bounty as his wife. He evidently intended to provide for the care of his wife as long as she lived, and then that his children should share his estate between them." That case stands very close to ours in its facts and the principles relied on to sustain it, and it is sufficiently like it to control our decision. It would be difficult, if not impossible, to distinguish the two cases. The question there was, What did the testator mean? and the inquiry here is, What did the testatrix mean? If it was held there that Elizabeth Taylor did not get a fee simple, how can it be said here that Mrs. Smith does get one and not a life estate? The only distinction is that there the remainder was limited to Isham U. Taylor's heirs, while here it is given to Mrs. Smith's heirs. If anything, it is more manifest in our case that Mrs. Atkinson intended the children to be among the principal objects of her bounty, and this is clearer and more evident than it was in *Taylor v. Brown, supra,* that Isham Taylor's heirs were as much the objects of his bounty as was his wife. In this will she twice mentions the children of Mrs. Smith as those who were favored by her, and should share in her bounty, and she gives them the fee, whereas, she gives Mrs. Smith, their mother, only the life estate. In the one case she wills the property to them directly, if their mother should not be living at the death of Miss Janie Strange, and the latter has not herself disposed of it, and dies without a child, or children, and in the other she limits the estate to them in remainder after their mother's death. There is manifestly no room here for the operation of the rule in *Shelley's case,* as it plainly appears that Mrs. Atkinson intended, beyond question, that the children mentioned by her should take, under the will, as purchasers, and not that the mother should take a fee simple absolute, so that the children should take by descent from her, at her death, if she had retained the property and owned it at that time, as was the case in *Whitfield v. Garris,* 134 N. C., 24. The clear purpose was that there should be two distinct and disunited estates, one for the life of Mrs. Smith, and the other in remainder to her children, and not that the life estate should unite with the remainder so that the children would take in the quality, or character, of heirs, or heirs of her body, as a class of persons to take collectively in succession, from generation to generation, as they would take by our cannons of descent. This is essential to bring the rule in *Shelley's case* into play, as they must take by limitation, and not by purchase, the rule itself declaring that where the estate is limited over to the "heirs" in fee or in tail, that word shall be one of limitation and not of purchase. 1 Preston on Estates; *Wool v. Fleetwood,* 136 N. C., 460-470; *Ward v. Jones,* 40 N. C., 404; *Mills v. Thorne,* 95 N. C., 362; *Whitesides v. Cooper,* 115 N. C., 570; *Nichols v. Gladden,* 117 N. C., 497; *May v. Lewis,* 132 N. C., 314; *Smith v. Proctor,* 139 N. C., 314; *Cotten v. Moseley,* 159 N. C., 11; *Jones v. Whichard,* 163 N. C., 241. In *Cotten v. Moseley, supra,* we said, citing *Crockett v. Robinson,* 46 N. H., 461, it is the form of the second limitation which determines the application of the rule, and it is so held in *Crockett v. Robinson, supra.* Under the rule in *Shelley's case,* the Court held that, "It is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. If the limitation were to A. for life, remainder to his heirs in fee simple, without other qualifying words, the actual intention would undoubtedly be that A. should take an estate for life only, and have no power to dispose of the remainder in fee, and negative words saying that A. should take for life only would add nothing to the clearness of the first words. The material inquiry is, What is taken under the second devise? If those who take under the second devise take the same estate that they would take as his heirs, or as heirs of his body, the rule applies. However clear the intention may be to create an estate in A. for life, remainder to his heirs, so that the estate shall go to those persons who are the heirs of A., and descend to his heritable blood in line of descent, the policy of the law, which established the rule in *Shelley's case,* did not allow such a limitation. By that rule no person was permitted to raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers." 6 Cruise, 325, 326, 328; Fearne on Con. Rem., 196; Hargrave's Tracts, 551; 4 Kent, 208, 214; *Denn v. Puckey,* 5 T. R., 299, 303; *Richardson v. Wheatland,* 7 Met., 172. That view of the rule was taken in *Nichols v. Gladden, supra,* by this Court, and it was added: "The material inquiry is, What is taken under the second devise?" But what is said in *Jones v. Whichard, supra,* a leading authority on this subject, is very appropriate to the special facts of our case, and to the form of the devise we are construing. After saying that, in order for the rule to apply where the words are "heirs" or "heirs of the body" (which are stronger words than those here to show descent), they must be used in their technical sense, and carry the estate to them, as an entire class, to take in succession from one generation to another, and must have the effect to pass the same estate to the same person, whether they take by descent or by purchase, the Court proceeds to state that, "Whenever it appears from the context, or from a perusal of the entire instrument, that the words were not intended in their ordinary acceptance of words of inheritance, but simply as a *descriptio personarum* designating certain individuals of the class, or that the estate is thereby conveyed to 'any other person in any other manner, or in any quality than the canons of descent provide,' the rule in question does not apply, and the interest of the first taker will be, as it is expressly described, an estate for life," citing numerous cases, some of them already cited in this opinion, *supra.* And referring to *Whitfield v. Garris,* 134 N. C., 24, and *Morrisett v. Stevens,* 136 N. C., 160, after commenting upon *Puckett v. Morgan,* 158 N. C., 344, the Court continued to say, that they were cases where one stock of inheritance was substituted, in certain events, for another, so that the former or ulterior devises would take as purchasers, and directly under the will from the devisor. The provisions in this will are much plainer to show an intent that the "children" should take in remainder, as purchasers and as immediate objects of the testator's bounty, than were those considered in the cases cited to manifest a purpose that the devisees there should take in that character. No such intention could have been expressed more clearly than by the language of this testatrix in her will, especially if it is read as an entirety, as it should be (*Jones v. Whichard, supra,* at p. 246), and when so read, we do not have to search long to find the true intent and meaning of the testatrix. We are not combatting the position taken by counsel that the word "children" may not sometimes be synonymous with "heirs" or "descendants." Redfield on Wills (3d Ed.), p. 16.

The law presumes that the possibility of issue is not extinct, and that there may be other children of the marriage to share in this property who, of course, have not signed the contract. Whether we construe the remainder to be vested, or as one, while vested, which will open and let in after-born children, who fulfill the description at the life tenant's death, or to be contingent, as being confined to those children living at the death of the first taker (*Irvin v. Clark,* 98 N. C., 437), it is apparent that there will be a defect in the purchaser's title, without considering the other question previously stated, as to the present minority of one of the children. We held, at this term, in *Morton v. Pine Lumber Co.,* 100 S. E., 322, that a guardian cannot sell, or part with, his ward's interest in land, but must do so, if at all, by regular judicial proceedings, under the statute, so that the Court may pass upon the necessity, propriety, or expediency of his doing so.

The court was in error when it construed this will otherwise than we have herein indicated its meaning to be, and for this reason the judgment must be reversed.

Whether the property can be sold under the statute relating to contingent estates and interests we have not been asked to declare.

Reversed.

O. L. HOLMES ET AL. v. GRAY BULLOCK ET AL.

(Filed 22 October, 1919.)

Courts—Jurisdiction—Pleadings—Amendments—Highways—Public Roads—Cartways—Appeal and Error—Procedure.

Township supervisors have authority over petitions to lay out cartways only, without that to lay off highways, the latter being for the county commissioners, and not the former. Hence, where the prayer of the petition for a cartway has been granted by the supervisors, appealed to and affirmed by the county commissioners, and thence goes to the Superior Court, on further appeal, the jurisdiction of the court is derivative from that of the supervisors, and the court, by amendment, cannot extend the jurisdiction by permitting an amendment so as to lay out a highway; and, when this appears to have resulted on appeal to the Supreme Court, the amendment will be stricken out, and the Superior Court will proceed to pass upon the case as presented before the amendment was allowed.

CLARK, C. J., concurs in part.

PROCEEDINGS for a cartway, tried before *Stacy, J.,* and a jury, at March Term, 1919, of CUMBERLAND.

This is a proceeding commenced by petitioners before the board of supervisors of Flea Hill Township (Cumberland County), for a cartway starting at a point on the national highway and extending along the lines of lands of defendants to a place near the lands of O. L. Holmes, one of the petitioners. The petition was filed alleging that it was a public necessity that such a cartway should exist, as the petitioners and others were in great need of a road on which to go to church, to mills, schools, etc. From an order by the board of supervisors to lay out a cartway, the defendants appealed to the board of commissioners of Cumberland County, and said commissioners sustained the action of the supervisors, and ordered the cartway to be laid out; from this order the respondents, on 3 June, 1918, appealed to the Superior Court.

At September Term, 1918, the Superior Court, *Lyon, J.,* presiding, signed an order granting petitioners leave to amend the petition so as to ask for a public road instead of a cartway, to which order respondents did not ask to enter an exception at the time; petitioners filed an amended petition on 5 October, 1918, and defendants filed an answer to same.

The case was tried at the March Term, 1919, and at this term defendants, for the first time, asked to be allowed to enter an exception to the order signed by the judge at September Term, 1918, and were allowed the exception as of March Term, 1919; this being after they had answered the amended petition.

There was a verdict and a judgment for petitioners. Defendants appealed.

Neill A. Sinclair and H. L. Cook for plaintiffs.
Broadfoot & Broadfoot and Bullard & Stringfield for defendants.

WALKER, J., after stating the case: We need not consider the case upon its merits, as we are of the opinion that an error was committed in allowing an amendment, so as to convert the petition for a cartway into one for a public road or highway. The case came to the Superior Court, first, by appeal from the board of supervisors, which granted the cartway, to the board of commissioners of the county, and from a like decision of that board to the Superior Court. The board of commissioners acquired only the jurisdiction of the supervisors, before whom the proceeding was begun, and the Superior Court acquired the same jurisdiction. Neither of them had the power to amend the petition so as to change it to one of which the board of supervisors had no jurisdiction. "The board of supervisors shall have the right to lay out and discontinue cartways, and the board of commissioners of the county only shall have the right to lay out and establish and discontinue public roads: *Provided,* that in laying out and establishing roads and cartways, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required:

Provided further, that either party may appeal from the decision of the board of supervisors to the board of commissioners of the county." Revisal, sec. 2683; Consol. Statutes, vol. 1, pp. 995, 1004, ch. 69, secs. 131, 166; Const., Art. VII., sec. 2. The jurisdiction of the Superior Court was entirely derivative. It acquired only the jurisdiction of the board of supervisors to determine whether a cartway should be established. *McLaurin v. McIntyre,* 167 N. C., 350; *Boyett v. Vaughan,* 85 N. C., 365; *Ijames v. McClamrock,* 92 N. C., 365; *Robeson v. Hodges,* 105 N. C., 49; *S. v. Wiseman,* 131 N. C., 797. The supervisors had no jurisdiction of proceedings for the laying out of a public road. The board of commissioners had no jurisdiction of proceedings for establishing cartways, and did not exercise any such jurisdiction, but confined itself to deciding whether the prayer for a cartway should be granted. The Superior Court had no original jurisdiction over cartways or public roads, and could only acquire such jurisdiction over such a matter by appeal from a body that did have such a jurisdiction. In this case, under all the pertinent authorities, it only acquired, by the appeal, jurisdiction to try and determine the proceedings for a cartway. By the appeal, the sole jurisdiction of the Superior Court was derived through the board of commissioners, from the board of supervisors, whose only jurisdiction was of the proceedings for the cartway. In order to ascertain the precise jurisdiction of the Superior Court, we must, in turn, find out what was the limit of the jurisdiction of the board of supervisors.

The Superior Court was in error when it undertook to enlarge its own jurisdiction, and to enter upon the consideration of a proceeding which was not before it and which was *coram non judice.* Being without the power to extend its own jurisdiction by amendment, the order allowing it was void. But this does not dismiss the case, but merely strikes out the amendment and leaves the proceeding in the condition it was when the order of amendment was made. It is not necessary to consider the other questions as to the time the exception was entered.

It will be, therefore, certified to the Superior Court that there is error, with direction to strike out the order of amendment and reverse all proceedings thereunder, and then to proceed further in the cause, according to the law, to try the issue as to the cartway.

Error.

CLARK, C. J., concurs: That the action should not be dismissed, but as the case goes back to the Superior Court to be tried by a judge and jury, sees no reason why the judgment and verdict already entered should not be affirmed.

This action was begun by petition before the township supervisors for the establishment of "a cartway," who allowed the petition, and on appeal to the county commissioners the action of the township supervisors was approved. On appeal from the county commissioners to the Superior Court, the judge granted an amendment to ask for a public road instead of cartway, to which the defendants entered no exception, but filed an answer on the merits. The judge had full power to allow any amendment. Rev., 1467. This did not change the nature of the action, but merely amended the scope of the petition, not by changing the cause of action, but broadening the relief asked as to this administrative measure, whether it should be a public road or a cartway. At the next term of the Superior Court the defendants raised objection for the first time to the jurisdiction, though they had filed an answer on the merits at the previous term.

The object of a trial is to ascertain the facts and the law on the matter in controversy, and when that controversy has reached a court, such as the Superior Court, which has full jurisdiction of the matter, and the relief granted is of the same general nature as the action begun in the lower court, there can be no sufficient reason why that court should not proceed to determine the controversy.

When the justice of the peace wrongly takes jurisdiction of a criminal action, on appeal to the Superior Court the case is not dismissed for want of jurisdiction in the magistrate, but a bill is sent and the case is tried *de novo*. *S. v. Neal,* 120 N. C., 618. When the clerk wrongly takes jurisdiction and the case by appeal or otherwise reaches the Superior Court, that court has jurisdiction, and Rev., 614, provides that the judge shall "hear and determine all matters in controversy in such action, and shall make any amendments whatever," and this was held to be so though the proceeding before the clerk was a nullity. *In re Anderson,* 132 N. C., 243; *R. R. v. Stroud, ib.,* 416; *Ewbank v. Turner,* 134 N. C., 81.

In *McMillan v. Reeves,* 102 N. C., 559, *Smith, C. J.,* applied to appeals in civil actions the same rule as in criminal proceedings, and says: "It is not material to inquire into the question of jurisdiction invoked in initiating the suit, since any objection on this account is obviated by the removal of the cause into the Superior Court presided over by the judge"; saying further, "The court, assuming to exercise jurisdiction, did possess it fully over the subject-matter of the action and the parties to it in which they were represented by counsel, and the cause was, in a strict sense *coram judice,* under the rulings in *West v. Kittrell,* 8 N. C., 493; and *Boing v. R. R.,* 87 N. C., 360, even without the aid of Laws 1887, ch. 276 (now Rev., 614), which sustains the jurisdiction thus acquired." The Chief Justice further said: "The objection to the jurisdiction has no force unless the proceeding in its entirety is a nullity, and it certainly cannot require argument to combat such contention. *Peoples v. Norwood,* 94 N. C., 167." In this last case the Court held that where the parties were before the court it was sufficient, though no summons was served.

In *Boing v. R. R.,* 87 N. C., 363, it was held that where the subject-matter of the action is one of which the court of the justice of the peace and the Superior Court had concurrent jurisdiction, on appeal the latter court will retain jurisdiction, though the proceeding in the court of the justice of the peace was void for irregularity. The ground given is that the case having gotten into the Superior Court, which has jurisdiction, the notice of appeal had the same efficacy as the service of a summons.

As far back as *West v. Kittrell,* 8 N. C., 493, it was held that where a cause was carried to the Superior Court from a lower court the former would retain jurisdiction, if it were a subject-matter of which the Superior Court would have had jurisdiction if the action had been originally instituted in that court. In *S. v. Neal,* 120 N. C., 618, it is said: "The case was tried before a justice of the peace, and the defendant appealed. In the Superior Court a bill of indictment was found by the grand jury and the defendant was tried thereon. Therefore, in any aspect, there was jurisdiction. Whether the court acquired it by the appeal, or had original jurisdiction by the indictment, it is immaterial to decide."

The above cases were cited in the concurring opinion in *S. v. McAden,* 162 N. C., 577, and it was added: "The sole object in serving a summons is to give the defendant notice to come into court. When he has had a trial, on a *bona fide* mistake of jurisdiction by the plaintiff, before a justice of the peace, and the case is tried, on appeal, in the Superior Court, the defendant has really had a more sufficient notice, and is better prepared to try than if he had been originally served with summons to appear in the Superior Court. There can be no good end served by dismissing an action thus brought into the Superior Court by appeal, and requiring the defendant to be again brought into the same court by the service of a summons to try the same case."

There are decisions to the contrary of the above holding that as to appeals in civil cases from a justice that a different rule applies than on appeal from a justice in criminal cases, or from the clerk, in cases where those courts were without jurisdiction, in which cases the Superior Court proceeds to try. There can be no reason why the same rule should not apply in such case as in the other two. The only reason assigned is that the jurisdiction of the Superior Court on appeal from a justice in a civil action is "derivative," but it can be no more so than an appeal from a justice in a criminal action, or an appeal from the clerk, in both of which no such objection obtains.

An examination of the Constitution will show no basis for the doctrine of "derivative jurisdiction" on appeals in civil cases to the Superior Court, but it is simply a survival of the former ideas obtaining, by which so many objections were held jurisdictional. For instance, if an action was brought in the wrong county it was dismissed and the plaintiff was put to the expense of bringing a new action in the other county, because he had guessed wrong as to the venue. In the search for efficiency and economy in the administration of justice, this was remedied by providing that if no objection was made before answering the trial would proceed, and that if it was made in apt time, the action was not dismissed, but simply removed to the proper county.

Formerly there were numerous forms of actions; indeed, Blackstone says that "no one knew their number," but if a party brought an action for debt when it should have been in covenant, or in detinue when it should have been replevin, or if the plaintiff guessed erroneously by using any other form of action than that which the court might deem the correct one, he was dismissed with costs and had to bring the same action, in another form, in the same court, and if he guessed wrong again he went through the same process until he guessed right. Also, there was anothers *pons asinorum* that if a man brought an action at law when it should be a suit in equity, or a suit in equity when it should be an action at law, he was dismissed and had again to come into court to proceed before the same judge, after much loss of time and expense. All these matters have been remedied by simply holding that when the party is in a court which has jurisdiction of the cause, the court will permit such amendments as it deems proper, and will proceed to try the cause of which it has jurisdiction.

As to appeals in criminal actions from the justice or in any case from the clerk, the same common-sense proceeding is followed of proceeding with the trial, irrespective whether the court from which the appeal was taken had jurisdiction or not. There can be no reason for an exception from this general rule in appeals from the justice of the peace in civil actions, or from an administrative board as in this matter of "laying out a road." Whether it was a cartway, or a public road, when the case got into the Superior Court it had full jurisdiction. The judge, as he had full power to do, made the amendment (Rev., 1467), and the defendant not only did not except, but waived the objection by filing an answer. The facts were found by the jury, and the law applied by the court, without any error assigned as to either. Why go over again the same evidence, and apply the same law, in the same court, when it had full jurisdiction of the parties and the subject-matter of laying out public roads, and no error was committed in the trial?

It would seem that the spirit and the letter of the Constitution and the practice obtaining in all other cases would require that the matter having been fully examined into and determined by a court having full jurisdiction and without any error assigned, the judgment should be

Affirmed.

J. H. BENNETT ET AL. v. J. T. PLOTT.

(Filed 29 October, 1919.)

Contracts—Breach—Counterclaim—Evidence Inadequate.

In this case the plaintiff sued to recover for services rendered under contract, and defendant set up a counterclaim for damages for plaintiff's breach thereof. *Held,* without discussion, the evidence of the counterclaim is too inadequate and uncertain to have submitted it to the jury, and judgment for plaintiff's demand was a proper one.

CIVIL ACTION, tried in Superior Court of ROCKINGHAM, before *Bryson, J.,* at June Term, 1919, upon the following issues:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: 'Yes; $445.50.'

"2. Are the plaintiffs indebted to the defendant, and if so, in what amount? Answer: 'No.' "

From the judgment rendered the defendant appealed.

J. M. Sharp for plaintiffs.
W. R. Dalton for defendant.

BROWN, J. This action was brought to recover for work done by the plaintiff for the defendant in South Carolina, the plaintiffs claiming that defendant owed them a balance for work done in the sum of $445.50. The defendant, answering, denied allegations of the plaintiffs, and set up a counterclaim for breach of contract in the sum of $2,000. There are three exceptions to the evidence which we have examined and find to be without merit. The fourth exception is as follows:

"4. That the court charged the jury as follows: 'As to the second issue, are the plaintiffs indebted to the defendant, and if so, in what amount? the court charges you that there is no evidence by which you could answer this issue in favor of the defendant, and instructs you, as a question of law, to answer that issue, "No." You will, therefore, concern yourselves with the answer to the first issue, applying to the evidence the rules of law I have given you.' "

The entire evidence discloses that the plaintiffs performed the work as alleged and were due the sum found, over and above all payments for the work and labor actually performed. We have examined the evidence upon which the alleged counterclaim is based, and are of opinion that it is entirely too inadequate and uncertain to justify his Honor in submitting the counterclaim to the jury, and we are of opinion that there is no necessity to discuss it.

No error.

CHARLES S. COMER, ADMR., v. CITY OF WINSTON-SALEM.

(Filed 29 October, 1919.)

1. **Municipal Corporations — Cities and Towns — Negligence — Bridges — Guards—Children—Questions for Jury—Nonsuit—Trials.**

A city having a bridge on its street across a stream some twenty feet below, the water rushing through a culvert with sounds to be heard on the bridge, and colored at times with many colors of dyes emptying into it from neighboring mills, and where the neighborhood children had been accustomed to play upon the street for many years, had provided the bridge with two parallel pipes one and one-half inches in diameter, one about eleven inches above the bridge level and the other about eighteen inches above the first, as guards, and allowed it so to remain without sufficient protection to prevent children from passing between the pipe guards, or falling from between them, when looking upon the many-colored water, and the stream as it dashed beneath the bridge. *Held,* such conditions, being peculiarly attractive to the children that frequented the place, afforded, in the insufficiently protected railing of the bridge, evidence of the actionable negligence of the city, in an action to recover damages for the death of the plaintiff's intestate, a 28 months old child, caused by its falling from the bridge upon its concrete foundation.

2. **Negligence — Parent and Child — Contributory Negligence — Evidence—Questions for Jury—Nonsuit—Trials—Municipal Corporations—Cities and Towns.**

The finding of the jury that the mother of the 28 months old child was not guilty in contributing to the negligence causing the death will be upheld upon evidence tending to show that while the mother was busy about her household affairs, the deceased had gone off with her little friend, and a few minutes afterwards was killed by falling from a bridge with insufficient guard rails across a city street, near a children's playground, not far from her residence.

3. **Appeal and Error—Evidence—Municipal Corporations—Bridges—Cities and Towns—Harmless Error.**

Where the negligence of the city caused the death of the plaintiff's intestate by permitting the guards to its bridge to remain insufficient for his protection, error, if any, in receiving testimony of a conversation of a witness with the engineer when constructing the bridge, as to danger of leaving it unguarded in that way, is harmless.

4. **Damages—Negligent Killing—Expectancy of Life—Net Worth—Negligence.**

The measure of damages for negligently causing a death is the present pecuniary worth of the deceased, ascertained by deducting the cost of his own living and expenditures from the gross income based upon his life expectancy, his prospects in life, his habits, character, industry and skill, the means he had of making money, the business in which he was employed, so as to ascertain his reasonable net income had not death ensued, and to arrive at his pecuniary worth to his family. *Poe v. R. R.*, 141 N. C., 525, where the court read to the jury the annuity tables, cited and distinguished.

WALKER and ALLEN, JJ., dissenting.

APPEAL by defendant from *Bryson, J.,* at May Term, 1919, of FORSYTH.

The plaintiff's intestate, Joseph Earl Comer, was a white child, about 28 months old, whose parents were preparing to leave the city, their household effects being at the railroad station for shipment. His mother was staying with her parents in Winston-Salem preparatory to West Street; its mother was helping in the housework preparing dinner at this time; there were thirteen members of the family; the child had not been out of the sight of the mother more than twenty minutes, and just five minutes before it was killed the mother had sent her younger sister, who found the child still playing in the yard.

West Street is one of the oldest streets in Salem, and runs east and west. The first bridge or culvert across Tar Branch was built with brick walls on either side, and around this culvert the children played, for it was a gathering place for the children of the whole neighborhood. Later this culvert was built by the Southbound Railroad Company, under a contract with Salem, which was afterwards consolidated with Winston under an act by which all contracts of Winston and Salem became the contracts and liabilities of Winston-Salem. This branch carries a considerable volume of water, and where it crosses West Street it is 8 or 10 feet wide, and the base of said culvert extends about 10 feet further south than the top of the culvert. From the water at the south end of the culvert to the top is about 20 feet.

The water, in passing over this extension of the base, rushes out with considerable force, making such noise that people passing along the top of the culvert can hear the rushing of the water. Owing to the dyes poured into the stream from the mills above the bridge, the water is at of its grandmother; about 200 feet from the bridge over Tar Branch in moving.

The intestate, with a 3-year-old child, was playing horse in the yard times of many colors. As the water runs out from under the culvert it empties off of said basin into a small pool. The rippling of the water can be heard by children on the bridge, but can only be seen by them by leaning over the banisters or railing or getting through it.

The jury found that the death of the plaintiff's intestate was caused by the negligence of the defendant, as alleged in the complaint; that is, that the culvert having been constructed in one of the principal streets in said city, at a point which was used as a playground by the children in the community, the city negligently and carelessly built the banisters over said culvert so unsuitable and unsafe that a child at the age of the plaintiff's intestate could, and did get through the banister or railing to see the rushing of the colored water, which it could hear, and, child-like, wished to see, and that by reason of such defective railing it fell and was killed. The jury further found that the plaintiff did not contribute to the injury of the intestate, and assessed the damages at $2,500.

F. M. Parrish and Jones & Clement for plaintiff.
Manly, Hendren & Womble for defendant.

CLARK, C. J. This case, in many respects, is a stronger case for plaintiff than *Starling v. Cotton Mills,* 171 N. C., 222, in which there was a reservoir near a cotton mill around which the children of the employees were in the habit of playing, and there was the protection only of a fence, which, becoming dilapidated, a child got through, and falling into the water, was drowned. The Court held, in that case, that it was the negligence of the owners of the mill that the fence was defective.

In this case the city was responsible for not maintaining an efficient railing, which would have prevented this child from getting through and falling twenty feet below upon the concrete bottom of the extension of the culvert. A small mesh, strong wire fence would have prevented such danger as this, and would have saved the life of the little one whose death was caused by leaning over the railing, or getting through it, to look at the gurgling, many-hued ripplings of the stream below.

As was well said by *Mr. Justice Walker,* in *Ferrell v. Cotton Mills,* 157 N. C., 540: "The doctrine which imputes negligence (to the parents) in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil." Again, on page 541, he said: "If parents are negligent in permitting children to play out of doors on public ground in the day time, unattended by the parents themselves or others, then, in the majority of cases, it will be necessary to go out of the business of raising or attempting to raise children, because parents cannot be with children at all hours of the day, neither is it practical to employ others to be with them to guard against unseen dangers."

It is alleged in the complaint, and admitted in the answer, that the bridge over the culvert, with the approaches, being a part of the street, is about 40 to 45 feet long and 40 feet wide; that on each side of the culvert, for about 45 feet, till the street strikes level land at each end, there are posts several feet apart of concrete, and in these are inserted two parallel iron pipes, about an inch and a half in diameter, the lower pipe being 11 inches from the top of the culvert and the upper pipe being 17 to 18 inches above this. There was evidence that since the construction of the culvert the street at that place has been especially attractive to children, who lean over the banisters to see the water as it rushes out at the southern end of the culvert, and it was while looking at the water, and probably by getting over, or under, the bottom pipe, that the child fell 20 feet on the cement extension and its skull was crushed, causing almost instant death, the water at the time being about 3 inches deep. The culvert is about 200 feet from plaintiff's house, and is near a number of houses in the community, it being in a residential and thickly-settled section, adjoining the playground where the children of the neighborhood were accustomed to gather.

A child cannot be kept in the house at all times, neither can it be chained, and if not allowed to play in the open, which necessarily means, in a city which is crowded, that it must play at times in the street, the children could not be raised, as light, air and exercise are absolutely necessary for their development.

There was ample evidence upon which the jury have found that the parents were not guilty of contributory negligence on this occasion. The little child went off with its little playmate to the playground of the neighborhood, where the children were known to be in the habit of gathering. It had only been gone a few moments while the busy mother was engaged in cooking dinner when the fatal accident occurred.

The plaintiff did not claim that the bridge was defective, but relied upon the fact that the authorities knew that the rippling of the water and its many-hued colors attracted the children, and that for twenty years the locality adjacent had been a playground for them, and with knowledge of the natural curiosity of children in such cases, more sufficient protection should have been placed at that point. Certainly the evidence should have been submitted to the jury upon the fair and impartial charge of the judge.

This is not even the case of an "attractive nuisance" on the property of another, which would render that other liable if not sufficiently protected. A silent turntable on the property of a railroad would not attract the attention of children as irresistibly as their irrepressible curiosity would tempt them to investigate the cause of the gurgling of the many-hued water, which rushed from under the bridge 20 feet below the point at which they would attempt to see it.

The bridge was not an attractive nuisance. It was not a nuisance at all. It was a necessary structure for the use of the city. But the noise made by the gurgling of the water would move children to wish to investigate the cause. There was no conflict of evidence that, as stated in the brief of the defendant, "for 20 years or more the children had been in the habit of playing in the vacant ground near by, and also coasting down the sidewalk on West Street, which sloped to the bridge, and also frequently played around and on the bridge." The negligence was not in the grade of the street, nor in the bridge or culvert, but in the want of sufficient protection for the children of the neighborhood frequenting that spot.

This little child was accompanied to the spot by his little playmate, who doubtless had told him of the wonders of this many-colored stream roaring out from under the bridge. Travelers in Europe go miles to see

"The blue rushing of the arrowy Rhone" (*Byron*).

Men cross the oceans to behold the swirl of waters at Niagara, and to see a mightier river dash itself into mist at the falls of the Zambesi, and to the childish mind this many-hued, gurgling water, viewed from a heighth of 20 feet, was as sufficient to compel this trip of 200 feet.

The nonsuit was properly denied. There was evidence to go to the jury upon the issues submitted to them. The defendant objected that evidence was admitted that while the bridge was being constructed a witness had a conversation, in 1917, with the engineer supervising the work in which the witness told him that he was putting up a trap to catch children, and the engineer replied that he was instructed to build it in that manner, but thought it dangerous himself. This exception, however, and the other exceptions as to evidence in regard to the contract under which the bridge was built, might be material if there was any defect alleged in the construction of the bridge, but the ground of the complaint is that the street at this point over the trestle, with the precipice of 20 feet at a point where children were accustomed to gather, and which was especially attractive to them, required that the city should have put up a stout wire fence or other guard after the culvert was built, that would keep young children from getting through the open work railing with liability of such fatal accidents as this. The negligence is not in the construction of the bridge, but in failing to have a protection of this kind against such danger as this, and the jury found that the city was negligent in this respect. The defendant well says, in its brief: "No matter who builds a bridge in the street, the municipality is responsible for its condition and method of construction from the standpoint of safety." If, therefore, it was error to admit the evidence objected to, it was harmless error, for the condition of the street and the lack of precaution for safety of children was the negligence of the city.

The defendant also objects to the charge of the court upon the measure of damages, which seems to have been, in effect, taken from that which was approved in *Mendenhall v. R. R.*, 123 N. C., at p. 278, as follows: "The measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income based upon his life expectancy. As a basis on which to enable the jury to make this estimate, it is competent to show, and for them to consider the age of the deceased, his prospect in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family. You do not undertake to give the equivalent of human life. You allow nothing for suffering."

This charge is in accordance with many other decisions. *Benton v. R. R.*, 122 N. C., 1007; *Coley v. Statesville*, 121 N. C., 301; *Pickett v. R. R.*, 117 N. C., 616. In *Watson v. R. R.*, 133 N. C., 191, the Court reviews these charges and approves them.

In *Poe v. R. R.*, 141 N. C., 525, on which the defendant relies, the court read to the jury the annuity table, but this was not done in the present instance by the judge, who simply gave them the mathematical rule prescribed in the above cases, and illustrated it to aid the jury in arriving at the present value of the loss sustained in the death of the plaintiff's intestate.

No error.

WALKER and ALLEN, JJ., dissenting.

THE MERCHANTS NATIONAL BANK v. L. C. PACK AND WIFE, D. L. PACK.

(Filed 29 October, 1919.)

1. Appeal and Error—Evidence—Pleadings—Harmless Error.

Defendant's exceptions to the introduction in evidence of an incomplete part of his answer to an allegation in the complaint, if erroneous, is harmless, or of insufficient importance to justify a new trial, when the witnesses have testified to the same state of facts, not controverted, and the charge of the court to the jury is a correct one.

2. Evidence—Impeachment—Former Examination.

For the purpose of contradicting the testimony of a party to the action on a material fact at issue, it is competent, on cross-examination, to read to him and question him on his examination previously taken before the clerk of the court upon the same matter.

3. Issues—Trials.

Issues are sufficient when they cover the case and present all matters in controversy.

4. Appeal and Error — Objections and Exceptions — Exceptions Correct in Part.

Exceptions taken to long extracts from the charge, which are correc in part, will not be considered on appeal.

5. Appeal and Error—Objections and Exceptions—Contentions.

Exceptions to the judge's statement of the contentions of the parties must be taken at the time it was made, in order to afford him an opportunity to correct them, or they will not be considered on appeal.

6. Deeds and Conveyances—Creditors—Fraud—Husband and Wife.

A deed of lands from a husband to his wife, when fraudulent, will be set aside as against the rights of creditors, when it is made to appear that it was without consideration, or that she participated in the fraudulent intent of her husband, or had notice thereof.

CIVIL ACTION, tried before *Bryson, J.,* and a jury, at May Term, 1919, of FORSYTH.

The plaintiff alleged that the defendants are husband and wife, and were so at the times hereinafter mentioned; that it was a creditor of the male defendant, L. C. Pack, when he conveyed to his wife by deed a certain tract of land therein described; that at the time the husband was then indebted to plaintiff and others, and made the deed to his wife without any consideration therefor and without retaining property fully sufficient and available to pay his then existing creditors; that the deed was executed with the intent to hinder, delay and defraud the plaintiff, that the wife had notice of the fraudulent intent of her husband, and actually participated in the fraudulent transaction, and further, that the husband acted as her agent in conducting and consummating the same.

The defendant denied all of these allegations, and alleged that the land was purchased with her own money and belonged to her, although title had been taken in her husband's name, and that he was a trustee for her, and that the transaction was wholly free from any fraud or dishonesty on the part of the defendants, or any intention of either of the defendants to defraud the husband's creditors.

The court submitted issues to the jury, and they found that the deed was executed by the husband with the intent to defraud his creditors, and that his wife had notice of the fraudulent intent of her husband when she accepted the deed. Judgment was entered for the plaintiff upon the verdict, and the defendants appealed, having reserved several exceptions.

J. E. Alexander for plaintiff.
Bennett & Brown for defendants.

WALKER, J., after stating the facts as above: The court permitted the plaintiff to introduce as evidence a part of the complaint, and the corresponding part of the answer. The objection was not to the competency of the pleadings themselves as evidence, but the only ground taken was that plaintiff was allowed to offer only a part of the answer, which was that L. C. Pack executed the deed to his wife, whereas, the whole of that part of the answer is as follows: "That the allegations set out in paragraph six are denied, except (it is admitted that Mrs. D. L. Pack is the wife of L. C. Pack, and that on or about the 19th day of February, 1917, the defendant, L. C. Pack, executed a deed to his wife, D. L. Pack), for a valuable consideration, all other allegations are expressly denied." We need not pass upon the correctness of this ruling of the court, as we are of the opinion, if there was error, it was harmless, as both L. C. Pack and his wife were examined as witnesses, and each of them stated on the direct examination that the deed had been executed at the time alleged in the complaint, 19 February, 1917, and there was really no conflict of evidence and no real controversy as to the existence of the fact. If there was error, therefore, it was harmless. The charge of the court, also, as we think, prevented any harm to the defendants, as it clearly stated the issues, and the evidence bearing upon them, which the jury should consider. It would not do to reverse upon so slight a ground, even if there was technical error. We have examined the entire case, with care and scrutiny, and cannot see that defendants have been prejudiced by the rulings. The defendants restricted themselves to a single ground of objection, and must abide here by the one they assigned below. *Rollins v. Henry,* 78 N. C., 342; *Kidder v. McIlhenny,* 81 N. C., 123; *Ludwick v. Penny,* 158 N. C., 104; *Proffitt v. Ins. Co.,* 176 N. C., 680; *S. v. Evans,* 177 N. C., 564. We cannot, therefore, consider the competency of the testimony, that is, the contents of the pleadings, though we may say, upon a review of all the evidence and the charge of the court, that if there was any error, in this particular, and proper objection has been made, this ruling would also have been harmless, or not of sufficient importance to justify another trial. 3 Graham & Waterman on Trials, 1235; *Brewer v. Ring and Valk,* 177 N. C., 476; *Schas v. Eq. Assurance Society,* 170 N. C., 420; *S. v. Smith,* 164 N. C., 476.

It was competent to read the examination taken before the clerk, and question L. C. Pack in regard to his answers, which appear therein, for the purpose of impeaching his testimony, as to the ownership of the property. If he had contradicted himself concerning this material fact, we see no reason why it could not be shown in this way. It is merely one way of showing contradictory statements of the witness. *Johnson v. R. R.,* 140 N. C., 581; *Keerans v. Brown,* 68 N. C., 43; *Edwards v. Sullivan,* 30 N. C., 302; *S. v. McLeod* 8 N. C., 344. And such evidence may also be used for the purpose of corroboration. *Allred v. Kirkman,* 160 N. C., 392; *Bowman v. Blankenship,* 165 N. C., 519.

The issues were sufficient to cover the case and to present all matters in controversy. *Hatcher v. Dabbs,* 133 N. C., 239; *Potato Co. v. Jeanette,* 174 N. C., 240, and cases there cited. The judge gave those of the requested instructions to which the defendants were entitled, and the charge was more favorable to them in some respects than they had the right to expect.

The exceptions to the charge are without any merit, and, besides, they are taken to long extracts therefrom, which are surely correct in some particulars, even if not so in others. When this is the case, the exception will not be considered. *Nance v. Tel. Co.,* 177 N. C., 313; *Ritter L. Co. v. Moffitt,* 157 N. C., 568; *Hendricks v. Ireland,* 162 N. C., 523. The charge was a fair, full and correct statement of the evidence and the law arising thereon, and complete, in all respects, with the statute. If the contentions of the parties were not correctly stated, the attention of the judge should have been called to it at the proper time, so that he might make the necessary change in them, if any was required. *McMillan v. R. R.,* 172 N. C., 853; *S. v. Foster, ib.,* 960; *Mfg. Co. v. Bldg. Co.,* 177 N. C., 103; *Alexander v. Cedar Works, ib.,* 138.

We may add that a purchaser from a fraudulent vendor must have acquired the land for value and without notice. If *feme* defendant did not pay value or purchased with full knowledge of the evil intent and fraudulent purpose of the vendor in making the conveyance to her, her title fails as to his creditors. *Cox v. Wall,* 132 N. C., 730; *Morgan v. Bostic,* 132 N. C., 743; *Crockett v. Bray,* 151 N. C., 619; *Eddleman v. Lentz,* 158 N. C., 65; *Pennell v. Robinson,* 164 N. C., 257; *Smathers v. Hotel Co.,* 168 N. C., 69, at pp. 70 and 71, citing *Vosburgh v. Diefendorf,* 119 N. Y., 357; *Giberson v. Jolly,* 120 Ind., 301; *Bank v. Fountain,* 148 N. C., 590. The jury have evidently found, when we construe the verdict in the light of the evidence and the charge of the court, as we should do, that the *feme* defendant paid no consideration for the land, and took the conveyance from her husband with full knowledge of his intent to defraud his creditors. In *Aman v. Walker,* 165 N. C., 224, 227, *Justice Allen* states the principles relating to fraudulent conveyances, and along with others are these two, which are pertinent to this case:

"1. If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid.

"2. If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee, *or of which he has notice,* it is void," citing *Black v. Sanders,* 46 N. C., 67; *Warren v. Makely,* 85 N. C., 14; *Worthy v. Brady,* 91 N. C., 268, and other cases, as supporting the classification. See, also, *Cox v. Wall, supra; Morgan v. Bostic, supra; Pennell v. Robinson, supra,* and *Smathers v. Hotel Co., supra.*

There was no ground upon which the court could have ordered a nonsuit. There was plenary evidence of the fraud.

The exceptions not specially considered by us are untenable.

No error.

M. L. JOHNSON v. W. J. BROTHERS

(Filed 29 October, 1919.)

Appeal and Error—Motions—Retaxing Costs—Former Judgment—Error in Judgment.

Where the Superior Court has ordered lands to be sold by its commissioner, and that he, out of the proceeds, pay off a lien thereon, costs, etc., and pay the balance to the plaintiff, from which he gave notice of appeal, which was not perfected, and consequently dismissed in the Supreme Court under Rule 17, and at a subsequent term of the Superior Court the plaintiff moved to retax the costs, which was denied and appeal taken from its refusal: *Held*, the motion, called by the plaintiff one to retax costs, was in fact one to correct an alleged error in the former judgment in not taxing them against the defendant, and the plaintiff is concluded by the former judgment, not having excepted and appealed therefrom, and alleging no errors or mistakes in any particular item of cost.

CIVIL ACTION, tried before *Bryson, J.*, at May Term, 1919, of FORSYTH.

The plaintiff brought this suit to recover possession of a storehouse, situated on leased premises in the city of Winston-Salem, N. C., together with $1,200 damages for the alleged detention of same by defendant. The case was referred to J. E. Alexander, referee, at the May Term, 1918, to find the facts and the law in the case, and report same back to the court. At the September Term, 1918, the referee duly filed his report, and after finding that defendant had a lien on said premises, he recommended that the property should be sold at public sale, and that the defendant should be paid his lien out of the proceeds thereof, and the excess paid to plaintiff. At the December Term, 1918, of the Superior Court, Judge Lane signed a judgment appointing a commissioner to sell the property, and out of the proceeds to pay the lien of defendant, to pay the costs and expenses of said sale, and the court costs, and pay residue, if any, to the plaintiff. The plaintiff thereupon gave notice of appeal to the Supreme Court, but failed to perfect his appeal, and the case was docketed and dismissed upon motion of the defendant at the Spring Term, 1919, of the Supreme Court, under Rule 17 of that Court. At the March Term, 1919, of the Superior Court, the commissioner filed his report of sale, and the same was confirmed by Judge Bryson at the May Term, 1919, and the moneys ordered disbursed in accordance with the judgment of Judge Lane at December Term, 1918.

Judge Bryson also signed a judgment, at the May Term, 1919, refusing to modify the judgment signed by Judge Lane at December Term, 1918, and to retax the costs, denied the motion of the plaintiff, who requested him to do so, and confirmed the judgment of Judge Lane. Plaintiff appealed to this Court.

Bennett & Brown for plaintiff.
W. T. Wilson for defendant.

WALKER, J., after stating the facts as above: The motion of the plaintiff, while called on to retax the costs, is really a motion that the court modify its former judgment as to the costs, by charging them against the defendant instead of directing, as the court did in its former judgment, that they be paid out of the fund. It is too late now for such a motion to be entertained, as the plaintiff is concluded by the former judgment. He should have prosecuted his appeal from the judgment at the proper time, and having failed to do so, he will not be allowed to attack the judgment by this collateral proceeding. The original judgment is not void, as the court had jurisdiction of the cause and the parties, nor is it irregular, as it was taken according to the course and practice of the court. It was, at most, erroneous, and the only way to correct it, if there was any error, was by appeal. It was said in *Creed v. Marshall,* 160 N. C., 394: "It is well settled that in any case where a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc,* provided the fact of its rendition is satisfactorily established and no intervening rights are prejudiced. If the written judgment fails to incorporate the true sentence or judgment of the court through inadvertence and in consequence of clerical errors or omissions, it may be completed by an order *nunc pro tunc,* or may be set aside and the true and correct judgment entered *nunc pro tunc.* But the power to amend the judgment as entered cannot be used for the purpose of correcting errors or omissions of the court. No amendment can be allowed simply for the purpose of entering a judgment which the court failed to render at the proper time, or to change the judgment actually rendered to one which was not rendered. Such procedure cannot be allowed so as to enable the court to review and reverse its action in respect to what it formerly either refused or failed to do. 23 Cyc., 843." The law, in this respect, has very recently been fully reviewed in *Mann v. Mann,* 176 N. C., 353.

The objection here is not to the items of the bill of costs, but it is now asserted that all of the costs were taxed against the wrong party. This is not retaxing costs, so as to correct errors in the amount of the costs, but is an effort to amend the judgment because of its erroneous taxation of any of the costs against the fund or the plaintiff, which cannot be done. There was no excusable neglect.

The motion was properly denied.

No error.

BOARD OF COMMISSIONERS OF WILKES COUNTY v. PRUDEN & CO.

(Filed 29 October, 1919.)

1. **Constitutional Law — Amendments — Roads and Highways — Counties—Bonds, Proceeds of Sale of—Local Legislation—Statutes.**

The Legislature, in 1915, authorized a certain county to issue bonds, declaring its purpose "to provide for a uniform, comprehensive, and practical system of roads in the county, calculated in a general way to serve the needs of every section," and for a wise, judicious, and equitable distribution of the funds so that each township and section of the county should be benefited to the advantage of the county as a whole. One-half of the bonds having been issued, and the proceeds found to be insufficient, and by the act of 1917, the amount authorized in 1915 having been reduced one-half, the Legislature in 1919 increased the issue to the amount authorized under the act of 1915, to carry out its spirit and intent, leaving its other provisions unchanged, but with the further provision that a certain part of the proceeds be applied to paying the expense of laying out and constructing a road in each township, the route or course thereof to be so laid as "to serve the best interests of the township." *Held*, the act of 1919 does not come within the inhibition of the recent amendment to the Constitution, Art. 2, sec. 29, as to the enactment of "any local, private, or special act authorizing the laying out, opening or discontinuing of highways."

2. **Same—Control of Funds.**

An act of the Legislature may prescribe a rule by which the proceeds of the sale of bonds it authorizes a county to issue for road purposes, shall be disbursed and distributed in order to effect the best results, when it is confined to the control and management of the funds, and leaves to the local authorities the power given them by the recent constitutional amendment over "the laying out, opening, or discontinuance of highways."

3. **Statutes— Repeal— Reenactment— Counties — Bonds — Roads and Highways.**

The act of 1919, relating to Wilkes County, reënacting and continuing in force the provisions of the act of 1915, restoring the authority to issue the amount of bonds for county road purposes, after it had been reduced by the act of 1917, was intended to enforce the will of the Legislature expressed in the act of 1915, by supplying the means and facilities, in the way of necessary funds, for doing so.

CIVIL ACTION, tried before *Webb, J.*, upon a case agreed, in the Superior Court of WILKES, 27 May, 1919.

The action was brought to test the validity of certain bonds, to the amount of two hundred and seventy-five thousand dollars, which have been issued, and contracted to be sold to defendants, by the county of Wilkes, for the purpose of constructing public roads in the said county. Public Local Laws 1915, ch. 345, authorized that county to issue bonds to an amount not exceeding five hundred thousand dollars for the purpose of "grading, building, and constructing public roads there, . . . and otherwise improving and maintaining the same." The act declares, in sections 19 and 20, its object to be "to provide for a uniform, comprehensive, and practical system of goods roads in the county, calculated, in a general way, to serve the needs of every section thereof," and then further provides for a wise, judicious, and equitable distribution of the funds derived from a sale of the bonds, so that each township and section of the county will be benefited, and in such a way as will be advantageous to the county as a whole. The bonds were issued and sold to the amount of two hundred and fifty thousand dollars, but this fund proved to be insufficient to carry out the scheme as to roads contemplated by the act, resulting from the sudden and large increase in the cost of labor and material necessary for the purpose, which undertaking was to be executed by the good roads commission appointed by the act. That body has since had complete control of the county's road system.

By chapter 63, Public Local Laws 1917, the act of 1915 was amended by reducing the amount of bonds authorized thereby from $500,000 to $250,000, and validating the previous issue of $250,000 in all respects. Section 3 of the act of 1917 provides: "That except as herein amended, the said chapter three hundred and forty-five of the Public-Local Laws of nineteen hundred and fifteen shall remain in full force and effect."

Public-Local Laws 1919, ch. 451, increased the bond issue of 1915, as reduced in 1917, and authorized an issue of $250,000 in bonds to complete the public roads of Wilkes County, as the proceeds from the former issue of $250,000 had proved insufficient for that purpose. That act provides that the proceeds of the bonds last authorized shall be distributed among the townships of the county, so as to carry out the spirit and intent of the act of 1915, that each section shall receive its proportionate share, and in order to accomplish this purpose it is further provided that a certain amount (naming it) shall be applied to paying the expense of laying out and constructing a road in each township, the route or course of the road to be determined by the commission, so as "to serve the best interests of the townships."

Public-Local Laws 1919, ch. 443, provides for the issue of $25,000 in bonds for the completion of the Boone Trail Highway to the line of Watauga County. There were other provisions in the acts just mentioned which need not be set out, as they are not material to the case and the question presented by it.

The commissioners have contracted with the defendants to sell the bonds for $275,000, authorized by both acts of 1919, to them, at a sum agreed upon, and have brought this action to recover the stipulated price. Defendants refused to pay because they allege that the bonds are invalid.

Judge Webb was of the opinion, and so held, that the bonds are valid, and gave judgment for the plaintiff. Defendants appealed.

Joseph M. Prevette and Hayes & Jones for plaintiff.
C. N. Malone and J. W. Hinsdale for defendants.

WALKER, J., after stating the facts, as above: The particular contention of the defendant is that the acts of 1919 are in violation of the Constitution, Art. II, sec. 29, which prohibits the enactment of "any local, private, or special act . . . authorizing the laying out, opening, altering, or discontinuing of highways," but we are of the opinion that this is a misconception of the object and purpose of those laws. It was not intended to require the local authorities to lay out, open, alter, or discontinue any road or highway, but they were passed by the Legislature for the purpose of enabling the local authorities designated in them to issue bonds, and out of the proceeds to pay the expense of constructing roads in the various townships of the county, in order, by special directions, to complete the scheme of road building which was authorized by Public-Local Laws 1915, ch. 345, and this will be apparent to any one who will read the four acts together. The exact location of the roads was left to the good judgment and discretion of the local authorities named in the acts, but in order to equalize the benefits to accrue to each and every part of the county, the Legislature considered it wise and expedient that the money raised by a sale of the bonds should be distributed upon some fixed basis, or according to a fixed rule, so that this equal apportionment might be the better enforced. It was not passing laws to lay out or construct roads, but to pay for these things by issuing and selling bonds, just as was done in *Brown v. Comrs.*, 173 N. C., 598. There is no prohibition in our Constitution, not even since the amendments of 1916-17 were ratified, which prevents the Legislature from passing an act to pay for the construction of roads in the manner prescribed in these statutes. The Court, in *People v. Banks*, 67 N. Y., 568, interpreting a provision of the Constitution of that State, which is similar to Art. II, sec. 29, of our Constitution, with reference to a statute containing language not substantially unlike that in the statutes under consideration, said: "The act under review does not in any of its provisions provide for the altering, opening, or working of a highway in the sense in which those terms were used in the statutes of the State regulating highways and public roads, or the constitutional provisions now invoked. Grading, paving, sewering, and ornamenting were even provided for in this act, since it could not be done by general law." It was held to be within the discretion of the Legislature. See, also, *Mills v. Comrs.*, 175 N. C., 215; *S. v. Lytton*, 9 Pac. Rep., 855.

The general road system of Wilkes County was established by the act of 1915, passed before the constitutional amendments of 1916-17 were ratified and took effect, and the statutes in question only provided the means whereby the roads could be constructed and maintained in the most rational and equitable way for the general benefit of the county, and to this end the Legislature authorized the issue of bonds to raise a fund of $275,000, and required that it should be so apportioned to the different sections of the county as to give each one its fair share of the benefit to accrue. The framers of the Constitution certainly did not intend to withhold their sanction from so beneficial a scheme for road improvement. As said in *Brown v. Comrs., supra:* "Such provisions are construed not to destroy or weaken the power of the General Assembly in its necessary control over the subordinate divisions of the State Government, but to prevent cumbering the statute books with a mass of purely private and local legislation." The *Brown case* has been approved in *Mills v. Comrs., supra; Parvin v. Comrs.,* 177 N. C., 508, and at the present term, in *Martin County v. Wachovia Bank & Trust Co.,* and *Surry County v. same defendant.* What is held in the *Mills case* is peculiarly applicable to the facts now before us, and upon which we are asked to decide as to the validity of these bonds. It was said there: "It is well understood that our General Assembly, at session after session, was called on by direct legislation to authorize a particular highway or street, or to establish a bridge or ferry at some specified place. . . . The Legislature, in these cases, was in fact called upon to usurp, or rather to exercise, functions which were more usually and properly performed by the local authorities, and it was in reference to local and special and private measures of this character that these amendments were adopted; and, as stated in *Brown's case, supra,* it was never intended to prohibit legislation authorizing the raising of proper funds by the sale of bonds, or by taxation, for measures required for the public good, though such funds should be for improvements in some fixed place or in restricted territory determined upon by local authorities in pursuance of general laws on the subject." And the language of the Court in *Brown's case, supra,* is equally and directly pertinent. Speaking of a statute somewhat similar to those upon which we are passing, and of the plain object of the law, the Court said: "An analysis of the act shows that its primary purpose is to authorize the sale of bonds for road purposes in North Cove Township, and to require the levying of a tax to pay the interest and principal of the bonds. . . . It only provides the means for constructing and repairing them. . . . Speaking of such legislation as affected by a constitutional provision, . . . the Pennsylvania Court, *In re Sugar Notch Borough,* 192 Pa. St., 349; 43 Atl., 985, says: 'The restrictions of the Constitution upon legislation apply to direct legislation, not to the incidental operation of statutes, constitutional in themselves, upon other subjects than with those with which they directly deal.' So, in this case, the bond issue being the direct legislation, the fact that it provides that the proceeds of the bonds are to be used for road purposes will not bring it within the prohibition of the constitutional amendment." Numerous cases are cited in *Martin County v. Wachovia Bank & Trust Co.* to the same effect.

If the Legislature may provide a fund necessary to lay out and construct roads, we are unable to perceive why it may not also prescribe the rule by which that fund shall be disbursed and distributed in order to effect the best results, when it confines itself, as it has done in this instance, to the control and management of the fund, and does not essay to have done any of the acts prohibited by Art. II, sec. 29, of the Constitution, but leaves these things to be performed by the local authorities in the due exercise of their proper functions. What we have said applies as well to the bonds for $25,000, issued to construct or complete the Boone Trail Highway.

There was one other question presented originally in the case, as to whether the ten per cent clause of the "Revaluation Act of 1919" would apply to the bonds for $275,000 issued under the acts of 1919, and upon the validity of which we are passing. We understand from the appellant's brief that this question has been withdrawn from our consideration, and we, therefore, do not further refer to it.

We have stated fully the provisions of the statute of 1915, not only because it was enacted before the adoption of the amendments of 1916-17, which took effect on 10 January, 1917 (*Reade v. City of Durham*, 173 N. C., 668), but also because it has been recognized by the act of 1917, amending it, and by the act of 1919, as having always been in force since it was passed, save and except as it was amended by the act of 1917, reducing the amount of the bond issue. The acts of 1919 were intended merely to enforce the will of the Legislature as expressed in the prior statute of 1915, by supplying the means and facilities for doing so.

The result is that the bonds in question are valid obligations of Wilkes County, and there was no error in the judgment of the court to this effect upon the case agreed.

Affirmed.

BETHLEHEM MOTORS CORPORATION ET AL. v. GEORGE W. FLYNT, SHERIFF.

(Filed 5 November, 1919.)

1. **Commerce—Automobiles—Demonstrations—Direct Sales.**

   Auto trucks consigned to selling agents from other States and warehoused in this State, though used for demonstration purposes, but sold to customers therefrom, are not in interstate commerce, and our statute taxing them is not in contravention of Art. 1, sec. 8 (3), of the Federal Constitution.

2. **Automobiles—Auto Trucks—Definition—Taxation.**

   Auto trucks come within the designation of automobiles used by our statute in taxing manufacturers of automobiles.

3. **Taxation—Constitutional Law—License— Automobiles— Foreign Dealers —Investments in North Carolina—Deductions—Equality.**

   Sec. 72, ch. 231, Laws 1917, imposing license taxes on the manufacturer or other person engaged in the business of selling automobiles in this State, reducing the rate if three-fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every State, and being for the object of reducing the license tax for selling automobiles in this State when the seller is already paying a tax here on three-fourths of his assets, is violative neither of the Federal Constitution, Art. I, sec. 8 (3), Art. IV, sec. 2, Art. XIV, sec. 1, nor of our State Constitution, Art. V, sec. 3.

APPEAL by plaintiffs from *Bryson, J.,* at May Term, 1919, of FORSYTH.

It appears from the facts found by consent and from the admissions, affidavits and pleadings in the cause that the plaintiff, the Bethlehem Motors Corporation, is engaged in the manufacture of Bethlehem trucks in Pennsylvania, and that of the other plaintiffs the National Motor and Vehicle Company is engaged in the manufacture of the National automobile in Indiana; the W. Irving Young & Company is a corporation of Maryland; that the Liberty Motors Corporation is incorporated in this State with its office in Winston, and that the National Motor Company is also incorporated in this State, with its principal office in Greensboro. The two companies last named represent W. Irving Young & Company as their agents at Winston and Greensboro.

Under authority of Laws 1917, ch. 231, sec. 72, the sheriff of Forsyth levied on a National motor car, and the sheriff of Guilford upon a Bethlehem truck for nonpayment of the license tax for selling under above section. The plaintiffs sued out a restraining order against the sheriff of Forsyth from selling the motor car and against the sheriff of Guilford from selling the Bethlehem truck. From the dissolution of said restraining orders the plaintiffs appealed.

J. E. Alexander for plaintiffs.

Jones & Clement for defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

CLARK, C. J. The facts being practically admitted, the real question before the Court is whether section 72, chapter 231, Laws 1917, is constitutional.

As found by the court, the trucks and automobiles consigned to the Liberty Motor Corporation and the National Motor Company by the other plaintiffs are sold direct by such consignees from their storage warehouses in this State. They are consigned to them for that purpose, and not to be used exclusively as samples or for demonstration purposes, and the court finds from the testimony that purchasers were obtained here by the said consignee companies, the cars and trucks on hand being used for demonstration, and the sales were made direct from their warehouses in this State.

Under such circumstances, the goods, after reaching the storage warehouse in this State, were not in interstate commerce. *Sewing Machine Co. v. Brickell,* 233 U. S., 304. Again, where coal was mined in Pennsylvania and sent by water to New Orleans, and sold on the open market on account of the mine owners in Pennsylvania; or even if the coal was not landed in New Orleans, but was sold and transferred there to another vessel bound to a foreign port, the coal was intermingled with property in Louisiana and the sale was not an interstate transaction. *Brown v. Houston,* 114 U. S., 622. There was no error in the exception that the judge did not find that this was interstate commerce.

It is assigned for error that the words in the statute, "manufacturers of automobiles," do not include "motor trucks." The definition of automobile is given, 28 Cyc., 24, as follows (which we think is correct): "An automobile, in the sense in which the term has come to be commonly understood, is a motor vehicle, usually propelled by steam, electricity, or gasoline, and carrying its motive power within itself. It falls within the appellation of 'carriage' and vehicle."

Said section 72, chapter 231, Laws 1917, imposed license taxes on every manufacturer or other person engaged in the business of selling automobiles in this State. The question intended to be raised by this appeal is the constitutionality of the second proviso in that section: "*Provided further,* that if the officer, agent, or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz.: bonds of the State of North Carolina, or of any county, city, or town of said State, or any property situated therein, and returned for taxation therein, the taxes named in this section shall be one-fifth of those named."

The plaintiffs allege that by reason of this proviso the act was in violation of the Federal Constitution, because:

1. It is in conflict with the interstate commerce clause, Art. I, sec. 8 (3).

2. It is in conflict with Art. IV, sec. 2, in that it deprives them of the privileges and immunities of other citizens.

3. It is in conflict with section 1 of XIV Amendment, in that it denies the plaintiffs equal protection of the laws.

First. Section 72 is not obnoxious to the interstate commerce clause. In *New York v. Roberts,* 171 U. S., 658, the Court says: "It must be regarded as finally settled by frequent decisions of this Court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State."

In regard to the contention that the statute discriminated against foreign corporations, the Court said: "If the object of the law in question was to impose a tax upon products of other States while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that, obviously, such is not the purpose of this legislation. Every corporation, joint-stock company, or association whatever, now or hereafter incorporated, organized or formed under, by, or pursuant to law in this State, or in any other State or county, and doing business in this State, . . . shall be liable to and shall pay a tax, as a tax upon its franchise or business into the State Treasury annually, to be computed as follows: . . . It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carry on manufacture, or mining ores, within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State."

In *Brewing Co. v. Brister,* 179 U. S., 452, it was held that the exemption from tax on sales by the manufacturer in Ohio of intoxicating liquor of his own make was not an illegal discrimination against a foreign corporation which was taxed on sales of its liquor manufactured outside of the State and sold in Ohio.

Section 72 does not tax the plaintiffs, or any of them, by reason of the manufacture of automobiles, but taxes only selling them in this State, after they arrive here and have become a part of the personal property in this State.

Second. Section 72 does not interfere with the privilege and immunities as citizens of the United States, for it has always been held that the term "citizen," in Art. IV, sec. 2, U. S. Constitution, which declares that, "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," refers to natural persons only, members of the body politic, owing allegiance to the State and not to artificial persons created by the Legislature and possessing only such attributes as the Legislature has prescribed.

Third. Section 72 does not deny the equal protection of the laws to the plaintiffs. While corporations are held to be persons within the equal protection and due process clauses of the XIV Amendment, they are not citizens within the privileges and immunities clause of that section. *Western Turf Association v. Greenberg,* 204 U. S., 363. While probably no manufacturer of automobiles in another State could invest three-fourths of all its assets in bonds of this State, or of any county, city, or town of this State, section 72 does not deny the plaintiffs the equal protection of the law because it confers no benefit on any citizen of this State which is not equally conferred upon a citizen of another State.

That part of the proviso which reduces the selling license tax from $500 to $100 upon the manufacturer who has invested at least three-fourths of his entire assets in any property situated in this State, or in the bonds of this State and its counties and towns, is not in violation of the U. S. Constitution. When the corporation is not created by this State, nor doing business here under conditions that subject it to process issuing from our courts, it is not within the provision of the XIV Amendment. *Blake v. McClung,* 172 U. S., 260.

Indeed, the provision is not discriminatory. In *Armour v. Virginia,* 118 Va., 242, the Court of that State sustained a statute imposing a license tax upon all merchants for the privilege of doing business, but exempting manufacturers who were already taxed on their capital by that State, and who offered for sale at the place of manufacture, goods, wares, and merchandise manufactured by them. This was affirmed on writ of error, *Armour v. Virginia,* 246 U. S., 1, already cited. To same purport, *New York v. Roberts,* and *Brewing Co. v. Brister,* both cited *supra.* To same purport, *Sugar Refining Co. v. Louisiana,* 179 U. S., 89.

The contention of the plaintiffs may be summed up in the proposition that the State having laid a tax of $500 upon the business of selling automobiles in this State, could not reduce the amount to $100 as to those persons or companies who have listed and paid taxes on three-fourths of their property in this State. We think this provision does not violate any clause, either of the State or Federal Constitution. Indeed, in our State Constitution we have a very similar provision in Art. V, sec. 3: "The General Assembly may also tax trades, professions, franchises, and incomes, provided no income shall be taxed when the property from which the income is derived is taxed." The object is to reduce the license tax for selling automobiles in this State in cases where such seller is already paying a tax to the State on three-fourths of his assets.

Affirmed.

LANDIS CHRISTMAS SAVINGS CLUB v. MERCHANTS NATIONAL BANK.

(Filed 5 November, 1919.)

1. **Evidence—Depositions—Trial.**

A party to an action must offer at the trial the whole of the depositions of his own witness, including his cross-examination, for it to be competent.

2. **Copyrights—Principal and Agent—Contracts—Fraud—Evidence—Declarations—Patents.**

Where the defense to an action on a copyright for exclusive territory is the invalidity of the copyright and the consequent lack of consideration, testimony of the defendant's witness of the representations of the plaintiff's agent in inducing the contract, which were material and false, is competent evidence.

3. **Copyrights—Courts—Jurisdiction—Contracts—Defenses—State Courts—Evidence—Experts—Invalidity.**

While the State Court has no jurisdiction over actions directly affecting the validity of a copyright, it is competent in an action therein to recover upon a contract granting certain exclusive territory, for the defendant to show by the opinion of experts therein, in connection with evidence that others had invaded his territory, that the idea was not patentable, and the contract was without consideration, the State Court having ample jurisdiction when the validity of the patent and failure of consideration is set up as a defense.

APPEAL from Forsyth County Court, *Starbuck, J.*, heard by *Bryson, J.*, at March Term, 1919, of FORSYTH, who affirmed the judgment.

Defendant appealed.

W. Reade Johnson and Craige & Vogler for plaintiff.

J. E. Alexander for defendant.

BROWN, J. The plaintiff, Landis Christmas Savings Club, entered into a contract with the Merchants National Bank, by the terms of which the plaintiff agreed to give to the defendant an exclusive license to use, for a period of five years, from 15 December, 1912, its system of operating and maintaining a "Christmas Savings Club," of which system it was the owner in a United States copyright, for which the defendant agreed to pay the sum of $100 per year. Some time later the plaintiff secured another United States copyright for the operation and maintenance of a "Vacation Savings Club," and on 4 November, 1913, the plaintiff and defendant entered into a supplemental contract by the terms of which it was agreed defendant would use both systems and purchase the necessary supplies therefor during the term stated in the original contract, and the consideration was reduced from $100 per year to $80 per year. This action is brought to recover $160, being for two years use.

The defendant denies the indebtedness and alleges that the execution of the contracts was procured by the false and fraudulent representations of plaintiff: That plaintiff falsely represented that the plaintiffs had a new invention or patent, and copyright for a plan of Christmas Savings Clubs; that its plan, being a new invention, was a monopoly, and that it had the right to sell exclusive privileges to defendant whereby it would have the sole and exclusive right to operate a "Christmas Savings Club," and the sole and exclusive right to the use of such name and advertising of such plan for the space of five years, and thereupon the contracts were entered into and carried out for three years, when another bank in Winston-Salem, to wit: Wachovia Bank & Trust Company, opened up on a large scale the identical, or nearly identical, plan and advertising, which plan of advertising and conducting the said clubs furnished by plaintiff to defendant under the contracts became a part thereof. That correspondence ensued between the parties to this action, the defendant asking of plaintiff explanations of this, none being given, the plaintiff avoiding a reply and contenting itself by merely sending its bill or offering to reduce the license fee to $25 and then $5 a year.

And defendant alleges that plaintiff has in effect admitted the falsity of its representations and abandoned its said contracts, or waived them to the extent stated above, and that said contracts are invalid, discharged, and of no binding force.

That as defendant is now informed, advised and believes, and so alleges, the matters, plans, and things sold or attempted to be sold to defendant as capable of being patented and copyrighted were not in fact the subjects of patent or copyright, and defendant alleges that, as it is now informed, advised, and believes, the said purported patents and copyrights are invalid, the said matter not being capable of being lawfully patented or copyrighted, such matter not being new, being largely merely mathematical calculations and not the subject of invention, patent or copyright, and not being lawfully salable as such. And defendant alleges that no recovery can be had by the plaintiff against the defendant on account of such attempted fraudulent sale of illegal patent and copyright privileges and licenses.

Defendant then sets up a counterclaim to recover money paid plaintiff under such contract.

Plaintiff offered the deposition of one Boll, but declined to introduce the last question and answer. Defendant excepted. This was error. This question has been decided differently by different Courts, but the weight of authority is that the party offering the deposition must introduce the whole of it, including the cross-examination. *Dawson v. Woodhull,* 67 Fed., 51; *Grant v. Pendery,* 15 Kan., 266; *Lanaham v. Lawton,* 50 N. J. Eq., 276; *Ins. Co. v. Knight,* 6 Wharton, Penn., 327; *Calhoun v. Hays,* 42 Am. Dec., 275; *Bank v. Rutasel,* 67 Iowa, 316; *Edwards v. Crenshaw,* 30 Mo. App., 510. This Court has aligned itself with the above cases. In *Boney v. Boney,* 161 N. C., 622, *Mr. Justice Allen* says:

"We have not been able to find a direct adjudication in this State sustaining his Honor in excluding parts of the deposition of Mrs. Turner, because the whole was not offered, but the authorities elsewhere are in accordance with his ruling. *Killbourne v. Jennings,* 40 Iowa, 475; *Schwartz v. Brunswick,* 73 Mo., 257; *Hamilton v. Milliken,* 62 Neb., 117; *S. v. Rayburn,* 31 Mo. App., 386; *Lanaham v. Lawton,* 50 N. J. E., 276; *Grant v. Pembry,* 15 Kan., 242." *Barton v. Morphis,* 15 N. C., 243.

The defendant excepts to the ruling of the court in excluding the testimony of Thomas Mastin as to the statements and representations made by plaintiff's agent to induce defendant to enter into the contract, and that such statements were false and fraudulent.

This testimony is set out in the record and is very material. We are of opinion that the court erred in excluding it, and directing a verdict for amount claimed.

The court should have submitted proper issues to the jury with appropriate instructions as to the validity of the copyright as an exclusive right, and the representations of plaintiff's agent as to its value and character.

Upon such issue the opinions of experts in patent and copyright law may be offered in evidence for the purpose of showing the worthlessness of the copyright as an exclusive right, as well as for the purpose of sustaining it upon the same principle that the opinion of lawyers learned in the law of another State may be offered in this State as to the law of their own State.

The State Court had ample jurisdiction to pass on the copyright when its validity is set up as a defense.

In *Gas Light v. Coke Co.,* 168 U. S., 259, the Supreme Court of the United States says:

"The State Court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Section 711 does not deprive the State courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of '*cases*' arising under those laws. There is a clear distinction between a case and a question arising under those patent laws. The former arises when the plaintiff, in his opening pleading—be it a bill, complaint, or declaration—sets up a right under the patent laws as ground for a recovery. Of such the State courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the State tribunals."

In his opinion in that case, *Mr. Justice Brown,* referring to a contrary decision of a State court, further says:

"There is, however, an overwhelming weight of authority to the contrary. Beginning with the case of *Bliss v. Negus,* 8 Mass., 46, in which, in a similar action upon a note, it was held the defendant might show that the patent had been obtained by fraud and perjury, the Supreme Judicial Court of Massachusetts has held steadily to the doctrine that where the question of the validity of a patent arises collaterally, it will take jurisdiction of it. In *Dickinson v. Hall,* 14 Pick., 217, evidence that the patent was void was held to be pertinent to show a total want of consideration for the defendant's note. The principal case, however, is that of *Nash v. Lull,* 102 Mass., 60, in which the opinion of the Court was delivered by *Mr. Justice Gray,* to the effect that any degree of utility or practical value in a patent will support the consideration paid for it; but that if it be wholly void, a note given for it is without consideration, and such issue may be tried in the State Court as well as in the Circuit Court of the United States. See, also, to the same effect, *Bierce v. Stocking,* 11 Gray, 174; *Lester v. Palmer,* 4 Allen, 145.

"Like opinions have been pronounced in the courts of New Hampshire, Connecticut, New York, Pennsylvania, Indiana, Wisconsin, Illinois, and Missouri; and in all these States the principle seems well established that any defense which goes to the validity of the patent is available in the State courts."

New trial.

MRS. CARRIE FIELDS v. S. A. OGBURN.

(Filed 5 November, 1919.)

Landlord and Tenant—Safety of Leased Premises—Landlord's Duty to Repair—Express Promise—No Implied Promise—Negligence.

There is no implied promise on the part of the landlord as to the safety of the house on the leased premises for occupancy, or duty to make repairs, and where the evidence tends only to show that the plaintiff lived for several years in the house, and was injured by the front porch rail giving away while she was leaning thereon and throwing her to the ground, by reason of its having been fastened with smaller nails than should have been used, in the absence of a special agreement of the landlord to repair or remedy the defect, or of evidence to show he had previous knowledge thereof, a judgment of nonsuit is properly allowed, although the plaintiff had previously called attention of the defendant's agent to the general state of disrepair of the building, which the agent refused to repair under the defendant's instructions.

CIVIL ACTION, tried before *Bryson, J.,* and a jury, at March Term, 1919, of FORSYTH.

This action is by a tenant and occupant of a dwelling-house against defendant, the landlord and owner, to recover damages for physical injuries caused by alleged negligence on the part of defendant in failing to keep the premises in proper repair. At the close of the plaintiff's testimony, on motion, there was judgment of nonsuit; plaintiff excepted, and appealed.

LeRoy B. Wall and J. Lindsay Patterson for plaintiff.
R. G. Stockton and Manly, Hendren & Womble for defendant.

HOKE, J. The facts in evidence tended to show that in October, 1916, the female plaintiff and her husband were tenants of a four-room dwelling-house, owned by defendant and rented to them by defendant's agent, and on said date, while plaintiff was sitting on the front porch of said dwelling leaning against the banister it gave way, throwing her from the porch to the ground, a fall of several feet, and causing serious and painful injuries from which she still suffers. That another woman had been leaning on the banister at the time and both fell to the ground. That the banister gave way from being insecurely fastened to the house with 4-penny nails, which were insufficient for the purpose, and after the injury the husband of plaintiff nailed same back with several 8-penny nails, and it was thereby made secure, continuing so thereafter while plaintiff remained at the house, a period of two or three months. That before the occurrence they had lived there as tenants for two and one-half years, and while plaintiff had continually complained to the agent of defendant for repairs which she desired, no complaint had been made of the condition of the porch or the banister in question, and in reply to her repeated complaints, the agent had several times made answer that he would like to do more for her, but that he could only go according to instructions, etc.

On these, the facts chiefly relevant, we concur in his Honor's view, and are of opinion that the judgment of nonsuit has been properly entered. In the absence of express stipulation on the subject, there is usually no obligation or assurance on the part of the landlord to his tenant that the premises will be kept in repair, or that the same are fit or suitable for the purposes for which they are rented. It is true that in case of latent defects of a kind that import menace of appreciable injury when these are known to the landlord, and of which tenant is ignorant and not likely to discover on reasonably careful inspection, liability has been recognized and recoveries sustained both on the ground of negligent breach of duty, and at times for fraud and deceit, but ordinarily, as stated in the well sustained brief of appellee's counsel, "There is no implied covenant in a lease of such property, either that the place is let for habitation or that the owner will keep the same safe and in repair, and ordinarily the doctrine of *caveat emptor* applies to leases of realty, and throws on the lessee the responsibility of examining as to existence of defects on the rented premises and of providing against their ill effects." Propositions that are approved by direct decision with us, and which prevail generally in jurisdictions where the rights of the parties are dependent on common-law principles. *Smithfield Improvement Co. v. Coley-Bardin*, 156 N. C., 255; *Edwards v. R. R.*, 98 N. Y., 245; *Mullen v. Rainear*, 45 N. J. L., 520; *Doyle v. R. R.*, 147 U. S., 413; *Walsh v. Schmidt*, 206 Mass., 405; *Thomas v. Lane*, 221 Mass., 447; *Philan v. Fitzpatrick*, 188 Mass., 237; *Calvin v. Beals*, 187 Mass., 250; *Howard v. Water Power Co.*, 75 Wash., 255; 3 Sherman & Redford on Negligence, sec. 709; 16 R. C. L., 772; in the Landlord and Tenant, sec. 268.

In *Smithfield Improvement Co. v. Coley-Bardin*, *supra*, *Associate Justice Brown*, delivering the opinion, it was said: "By the common law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purposes for which they are rented."

In *Edwards v. R. R.*, *supra*, it is held that, "There is no implied warranty upon the devise of real estate that it is fit for occupation or suitable for the purposes for which it is leased."

In *Calvin v. Beals*, 187 Mass., injury from a defective railing on a piazza, recovery was denied, the Court stating the general position applicable as follows: "The general rule in this commonwealth must be considered as settled, that a tenant cannot recover against his landlord for personal injuries occasioned by defective condition of the premises let, unless the landlord promises to repair, makes the repairs, and was negligent in making them."

We consider these authorities as decisive of the questions presented, nor do we see that the principles upon which they rest are in any wise affected by the cases cited for appellant.

Bailey v. Long, 175 N. C., 687, presented a case where a patient, taken for treatment in defendant's hospital, claimed to have been injured from exposure caused by a defective building. There the defendant retained the control of the building and of the particular room as well, and in referring the case to the jury, the rights of the parties were made dependent upon the contract, and the duties growing out of the relationship thereby created between them.

In *Rucker v. Willey,* 174 N. C., 44, there was an express agreement for repairs on the part of the landlord, and *Knight v. Foster,* 163 N. C., 329, was made to rest upon the facts peculiar to that case and involving the duties and obligations of a landlord and owner towards third persons. The respective obligations as existing between landlord and tenant were not directly presented.

We find no error in the record, and the judgment of nonsuit is

Affirmed.

W. M. STORY, TRADING AS W. M. STORY LUMBER CO., v. C. W. STOKES AND J. F. STOKES, TRADING AS VALLEY LUMBER CO.

(Filed 5 November, 1919.)

1. **Contracts—Questions of Law—Questions for Jury—Trials.**

What is the contract that was made by the parties is an issue of fact for the determination of the jury, but when it is admitted or proven, its meaning is a matter of law for the Court.

2. **Principal and Agent—Ratification—Evidence.**

In this case it is held that upon the material question of whether the principal had accepted a contract made in its behalf by its agent, there was sufficient evidence for the determination of the jury, that it had done so, not alone from the correspondence and other writings between the parties, but upon the oral evidence and consideration of their acts and conduct evidencing their mutual intent.

3. **Appeal and Error— Contentions— Instructions— Objections and Exceptions.**

To errors claimed in the statement of the contentions by the trial judge, his attention must have been called at the time so that he could have had opportunity for making the proper amendments, or exceptions thereto will not be considered on appeal.

4. **Contracts—Carriers of Goods—Embargo—Tender of Shipment—Defenses—Evidence—Trials.**

Where an action is brought against the seller of lumber for his breach of contract in not shipping it, and it appears that the defendant has not tendered it for shipment, the fact that an embargo had been placed on shipments will not avail as a defense, where special permits for shipment had been secured by the other party, and especially where the determination of the controversy has been made to depend upon other matters.

5. **Contracts—Breach—Vendor and Purchaser—Damages—Contemplation of Parties—Resale—Profits Prevented.**

Where the seller of lumber knew the purchaser was a wholesale dealer, who was selling under contract to others, and had so sold the lumber, and breached his contract for its delivery, the profits prevented thereby under contracts of sale made by the purchaser are held to be certain and capable of admeasurement, and within the reasonable contemplation of the parties at the time of making the contract, as a probable result of its breach, and may be included in the damages recoverable in the purchaser's action.

6. **Contracts—Breach—Place of Delivery—Damages.**

Held, in this action to recover damages of the seller of lumber for his breach of contract in not shipping it, that, according to the shipping instructions and other evidence, the delivery was to be made in New York and the market price there could be used as the basis for the admeasurement of the damages.

7. **Evidence—Letters—Correspondence—Memoranda—Book Entries.**

The admission in evidence of a letter in the correspondence written by the objecting party, relating to a contract made by him for the sale of lumber, when material, may properly be admitted as his declarations; and entries made on the sales book by the witness may be used by him to refresh his memory as to the transactions entered, especially when he has testified to his independent recollection thereof.

8. **Contracts— Breach— Vendor and Purchaser— Resales— Damages — Evidence.**

Where the plaintiff has made various contracts for the sale of lumber, based upon his purchase of the lumber for wholesale purposes from the defendant, with the latter's knowledge, it is competent for the plaintiff to show by his evidence his inability to perform his own contracts of sale, by reason of defendant's failure to ship the lumber, as bearing upon the measure of damage he has sustained by the said breach.

CIVIL ACTION, tried before *Lane, J.*, at May Term, 1919, of DAVIDSON.

Plaintiffs alleged that defendants are engaged in the business of operating sawmills and selling lumber, at Newsom, N. C., and the plaintiffs are engaged in the business of buying lumber and selling the same at wholesale to the trade, at the city of New York. Plaintiffs further allege that on the 17th day of April, 1917, the plaintiffs and defendants made a contract by the terms of which contract the defendants sold to the plaintiffs a lot of lumber, as follows, to wit:

500,000 feet 1 x 4 and up, S2S, at $14.
2 cars 2 x 4-10 and up, S1S and 1E, at $14.
250,000 feet 2 x 4, 6, 8, 10, and 12-10 and up, S1S and 1E.

And the defendants agreed to deliver said lumber to the plaintiffs f. o. b. cars on a 12-cent rate of freight to Norfolk, Virginia. That defendants failed to keep and perform the contract and to deliver the lumber as promised, and when they were requested by plaintiffs to do so, and because of this breach and failure to deliver, the plaintiffs were compelled to buy lumber, in the open market, at higher prices than those named in the contract for the purpose of filling their contracts with their customers, and by reason thereof they were damaged to the amount of five thousand five hundred and twenty-seven dollars, for which amount they demand judgment.

Defendants denied that they were engaged in operating sawmills, but admitted that they were engaged in selling lumber, and that plaintiffs were engaged in buying it to be sold at wholesale to the trade, as alleged; they deny the contract and the other material allegations of the complaint.

The jury rendered a verdict for the plaintiffs, and assessed their damages at $2,125. Judgment was entered thereon, and defendants appealed.

J. Gilmer Korner, Jr., Louis M. Swink, Fred S. Hutchins, and Walser & Walser for plaintiffs.

Raper & Raper for defendants.

WALKER, J., after stating the facts as above: The defendants have reserved several exceptions as to evidence and other matters affecting the merits of the case and the damages. The objections to evidence will be postponed for consideration until we have passed upon the other alleged errors, which we will discuss in the order of their assignment.

The court properly submitted to the jury the controverted question, whether the contract, which was made by Stemple for the plaintiffs, with Stokes for the Valley Lumber Company, had been accepted, and confirmed by the plaintiffs. What is the contract? is a question of fact for the jury (*Devries v. Haywood,* 64 N. C., 83), but when the contract is admitted, or proven, its construction is a question of law for the court. There was some evidence here that the contract made by Stemple had been confirmed, and, moreover, that defendants so understood it. It was for the jury to say, by their verdict, what was the truth of the matter. The instruction of the court in this respect was simple, direct, and clear, and left it to the jury to find whether there had been an approval by the plaintiffs of the terms of the Stemple contract, which was made subject to their ratification. We do not think that this was to be determined solely by the letters, or other writings, upon a legal construction of them, but upon the evidence, oral and written, because it was a question of intention, that is, what the parties said, and did, and what they mutually meant by their acts and conduct. The defendants, in several letters, particularly the one of 14 May, 1917, complain, not that the parties had disagreed about the specific terms of the contract, but that they had been disappointed in getting the necessary stock, which they thought had been secured, and promised if they could get the cars accepted for immediate shipment that they would send forward at least one car, regretting their inability to serve the plaintiffs better. They still did not ship, and plaintiffs' letters then urge them to do so and notify them that they have made contracts of resale. Storey went to Newsom, N. C., talked with the defendants, and he says they promised "to get off two cars promptly." When defendants gave one excuse after another for not shipping—failure of parties with whom they had contracted for stock, to deliver the same, embargo of the railroad companies on shipments, and lack of permits—plaintiffs promised to help them out in regard to these matters, and did secure a special permit. The correspondence tends to show that defendants were not attempting to perform their contract, and plaintiffs complained of it, and charged that their Mr. Stemple had informed them of defendants' selling to other parties the lumber which they had contracted to ship to them. The excuse for not shipping the lumber, as stated in letters of 21 May and 4 July, 1917, and in others, seemed to be that they could not get the stock. They do refer in one of the letters to some disagreement as to the way the lumber should be worked and the terms of settlement, but when we examine the lengthy correspondence, we can easily discover some evidence for the jury to the effect that the contract was sufficiently understood, and especially so when it is read in the light of the oral testimony. The judge stated to the jury that, according to Storey's testimony, the plaintiffs confirmed the contract, as soon as they heard from Stemple what it was, and the conduct of the defendants subsequently, as disclosed by the correspondence and the other testimony, supports the statement.

2. Several of the exceptions were taken to the judge's recital of the different contentions in the case, as to the evidence. If they were not correctly stated, the judge should have been requested, in due time, to make the proper amendments. This was not done. *Matthews v. Myatt,* 172 N. C., 230; *S. v. Merrick, ib.,* 870.

3. As to the embargo on shipments, this is no protection to the defendants, for they did not tender the lumber for shipment, and, besides, the plaintiffs proposed to get for them the necessary permits.

The other parts of the charge were clearly right, and perfectly fair to both parties. There was ample evidence to support it, and defendants have no just ground for complaint.

Plaintiffs assert that defendants refused to ship the lumber, not for the reasons they gave, that they could not get the stock from which to make it, or that its shipment had been embargoed, but because the market price of lumber was rapidly rising, and they had found another customer with a better price, and that the defendants' excuses were not frank and well founded. While this may or may not be so, and it was denied by the defendants, we are unable to declare that there was absolutely no evidence to sustain such a theory, and, therefore, we cannot say that the argument was so wholly unfounded that it should not have any weight with the jury, but should have been excluded from the consideration of the case.

4. As to damages. The sale of the lumber was made to the plaintiffs with full knowledge on the part of the defendants as to the nature of their business, in other words, that plaintiffs were buying the lumber for resale, and defendants were specially informed of it, and the correspondence, and other evidence, show that plaintiffs had outstanding contracts with other parties for the purchase of the lumber at a higher price, which would bring a considerable profit to the plaintiffs. It was held, in *Johnson v. R. R.*, 140 N. C., 574, 577, that, when the action is for a breach of contract, the damages recoverable are such as naturally flow from the breach, and such special or consequential damages as are reasonably presumed to have been within the contemplation of the parties at the time they made the contract, as the probable result of a breach of it. In ascertaining what damages come within the rule, it is proper to examine, not only the terms of the contract, the subject-matter, etc., but also to inquire whether such circumstances or conditions as produced special damages were communicated to the defendant. We apprehend that the same rule prevails when an action in the nature of tort is brought for the breach of a duty arising out of contract, citing *Williams v. Tel. Co.,* 136 N. C., 82; *Dayvis v. Tel. Co.,* 139 N. C., 79, and *Lee v. R. R.,* 136 N. C., 533, where it was said: "It is immaterial whether we treat the cause of action as for a breach of contract or for a negligent omission to perform a public duty arising out of a contract. The damages in either case are confined to such as were reasonably within the contemplation of the parties when the contract was made by which the duty to the plaintiffs was assumed. That for failure to deliver freight, when the carrier is not informed of the special circumstances causing the loss of the plaintiff's contract with other persons, the measure of damages is the difference between the market value of the article at the time it ought to have been delivered and the time it was in fact delivered."

Joyce on Damages, sec. 1956, thus states the rule: "Where the delivery of freight is negligently delayed by a carrier, there may be in an action for the breach of the contract recovery of such damages as are the natural and proximate result of its act, and for such as reasonably might have been expected to be within the contemplation of the parties at the time of entering into the contract, as the probable result of a breach. When the carrier has notice of the fact that a delay in the delivery of the goods will result in an unusual loss or some special damage to the shipper, there may be a recovery for the actual damages sustained, when the notice is of such a character that it will be presumed that the carrier contracted with reference thereto." *Lindley v. R. R.*, 88 N. C., 547; *Swift River Co. v. R. R.*, 169 Mass., 326.

Justice Rodman said, in *Lewis v. Rountree*, 79 N. C., 122, 124: "The contract of the defendant may be regarded as a contract to deliver the rosin at any usual market to be named by the purchaser, the purchaser taking on himself the risk, trouble, and expense of transportation. As damages recoverable on a breach of a contract are the natural and probable consequences which the parties may be supposed to have had in contemplation, it would seem reasonably to follow that a knowledge by a vendor of the purpose which the vendee had in view in making the purchase, was an essential element in estimating the damages likely to be sustained by a breach. Many cases support this proposition."

And again: "There can be no doubt that a vendee who takes a warranty and gives notice that he buys to sell again in another market, may include in his damages both the losses he actually sustained by reason of the breach, and also the profits he would have made upon resale, had the article been what it was warranted to be."

In *Mace v. Ramsey*, 74 N. C., 11, the charterer of a boat was held entitled to recover the profit he would have made, under the circumstances, which were in the contemplation of both parties. The rule of damages was held, in *Spiers v. Halstead*, 74 N. C., 620, to be the profit which plaintiff would have made on a resale of the goods, which really, in that case as it is here, was the difference between the contract price and what he could get for the goods at the place of delivery. *Clements v. State*, 77 N. C., 142.

We thus stated the general rule, in *Machine Co. v. Tobacco Co.*, 141 N. C., 284, 289: "The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. *Benjamin v. Hilliard*, 23 How., 149; *Mace v. Ramsey*, 74 N. C., 15. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed. *Ashe v. DeRosset,* 50 N. C., 299; *Griffin v. Colver,* 16 N. Y., 489. It is the rule last stated which principally raises the doubt as to whether profits of the future should be included in any estimate of damages. They may be necessary to completely indemnify the injured party, and they may also answer the other requirement, in that the loss of them may naturally be expected to proximately result from a breach of the contract; but there still remains another important element to be considered, and that is whether there is any reliable standard by which they can be ascertained, for we have seen that the damages must be certain, and this certainty which is required does not refer solely to their amount, but also to the question whether they will result at all from the breach. It is clear that whatever profits are rejected as an item in the calculation of damages, it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages." See, also, *Critcher v. Porter Co.,* 135 N. C., 542, 551, where we said: "In *Lewis v. Rountree,* 79 N. C., 123; 28 Am. Rep., 309, the plaintiff was permitted to recover upon the basis of the price of the rosin in New York, to which point it was shipped, for the reason that it was purchased for resale there, and the defendant had notice of it. In *Mace v. Ramsey, supra,* the boat was hired for a particular occasion, and the plaintiff had engaged a certain number of passengers at an agreed price. The Court held that such loss as ensued was within the contemplation of the parties." There are many authorities to this effect, and it may be well that we should refer to a few of them. The rule was laid down (in *Hadley v. Baxendale*) that the damages recoverable for breach of contract are such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from the breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. 8 R. C. L., 455 (sec. 25). Where a contract is entered into with a view to future profits, such profits are to be deemed to be within the contemplation of the parties, and are recoverable if they are certain and can reasonably be estimated, in an action for a breach of the contract. *Wakeman v. Wheeler,* 101 N. Y., 205; *Davidson Hardware Co. v. Buggy Co.,* 167 N. C., 423, at p. 425. Where the plaintiff proves a contract, its breach, and the loss of a certain sum resulting from the breach, upon all the authorities the burden lies on the defendant to prove anything in diminution of the damages. *Rodman, J.,* in *Oldham v. Kerchner,* 79 N. C., at p. 114. The allowance of profits for the breach of a contract, when not excluded as unnatural or remote, is wholly a question of the certainty of proof, and whenever a certain gain prevented is provable, and was contemplated by the parties, it may be recovered. *Joske Bros. v. Pleasants,* 53 L. R. A., p. 40 (note e). Lost profits may be recovered for breach of a seller's contract, where evidence relevant to the inquiry affords data from which the amount may be ascertained with a reasonable degree of certainty. *Hardware Co. v. Buggy Co.,* 167 N. C., 423.

There are no such uncertainties, in this case, that the failure of any one of them would subvert the whole computation as to damages. And, in this connection, we may say that the defendants' contention that the deliveries were to be made at Newsom, N. C., is clearly unsound, as they were to be made in New York, according to shipping instructions, and it reasonably appears that the sales by the plaintiffs at that place were made according to market prices prevailing there. So that the case could be brought within the rule which the defendants rely on. *Berbarry v. Tombacher,* 162 N. C., 497; *Lumber Co. v. Mfg. Co., ib.,* 395; *Lumber Co. v. Furniture Co.,* 167 N. C., 565.

We are of the opinion that there was ample evidence, from which it could be inferred, that profit, which could be ascertained with sufficient certainty, would have been realized from a resale of the lumber, if the contract had been performed by the defendants, and that those cases cited by them, where the profits were uncertain or speculative, do not apply to the evidence in this record, or to the facts deducible therefrom.

5. As to the questions of evidence. The letter, exhibit "E," was competent, as it was a part of the correspondence between the parties. It came from the defendants, and contained their own declarations about the transaction. The book of sales, the entries in which were made under his supervision, was competent to refresh the memory of the witness, and to corroborate him (*Bowman v. Blankenship,* 165 N. C., 521-522), and besides, he testified that he had an independent knowledge of the facts and items recorded in it. The testimony as to plaintiffs' inability to perform their own contracts of resale, which were made in reliance upon the defendants' shipment of the lumber, according to the terms of their contract, was competent, as it tended to show what the damages were—how much they had lost by the defendants' delinquency. The latter knew that the lumber was purchased from them for resale in New York. They practically admit this to be so by their answer to the first two sections of the complaint. They must have known that plaintiffs would have to supply the place of lumber they should have received from them, in order to save themselves from answering, in damages, to their own customers.

The other exceptions, not covered fully by what we have already said, are in themselves without any merit.

We find no error in the record, after a most careful examination of it, and a full consideration of the material exceptions.

No error.

GUILFORD LUMBER MANUFACTURING COMPANY ET AL. v. M. L. HOLLADAY, GREENSBORO COLLEGE FOR WOMEN, ET AL.

(Filed 5 November, 1919.)

1. **Materialmen—Liens—Principal and Surety—Contracts—Breach—Statutes.**

The surety on a contractor's bond, to the effect that the contractor shall complete the building of the owner in accordance with the builder's contract, plans and specifications, supply and materials, etc., therefor, and fully reimburse the owner for all outlay and expenses he may incur by reason of the contractor's default, cannot be held liable by the owner for the claim of a materialman, when the contractor has completed the contract according to its terms, the building has been accepted by the owner, and he has paid the contractor a balance due him, under a full statement of the amounts then owing on the building. Rev., 2021.

2. **Same—Principal and Agent.**

Where the contractor for the erection of a building has completed it according to the terms of his contract with the owner, has given him a full statement of the various items owing on the building (Rev., 204), and thereupon the owner has voluntarily paid him the balance of the full contract price, the surety on the contractor's bond given to the owner to save the latter harmless in the event of the contractor's default in so completing the contract, is not liable to the owner for the account of an unpaid materialman, for such payment of the owner was in violation of his statutory duty to pay the materialman, and having trusted the contractor to do this for him, the latter acted as his agent, for whose failure to pay the claim the owner is responsible.

3. **Materialman—Liens—Contracts—Statutes—Principal and Surety.**

The requirement of Rev., 2021, that the contractor furnish the owner of the building being constructed a statement of persons and amounts he owes for materials, when complied with, makes it the duty of the owner to retain from the amount then due the contractor, so far as it extends, the amounts due by the latter to the materialmen, and pay it to them, and under ch. 150, sec. 4, Laws 1913, no payment to the contractor after such notice shall be a credit on or discharge of the lien provided for the materialmen, etc. *Held*, these statutes become a part of the building contract, and while enacted primarily for the benefit or protection of the workmen and materialmen, it is also for the protection of the owner and the surety on the contractor's bond.

4. **Same—Advantage of Wrong—Equity.**

Where the owner voluntarily pays to the contractor, after the completion and acceptance of his building, the full balance of the contract price, having received the contractor's statement of persons and materials still owed by him thereon (Rev., 202), his conduct in so doing is wrongful to the materialmen, of which he will not be permitted to take advantage to the loss of the surety on the contractor's indemnifying bond, in his action to recover thereon.

5. **Principal and Surety—Debtor and Creditor—Security—Exoneration.**
Where a creditor voluntarily parts with a security for his debt, the surety on the debtor's bond is exonerated to the extent of the value of the security he could have applied to the obligation.

Civil action, tried before *Lane, J.,* at February Term, 1919, of Guilford, upon exceptions to report of referee.

The court overruled the exceptions filed to the report by the defendant Armfield, and gave judgment against him in favor of the Greensboro College for Women.

The defendant Armfield excepted and appealed.

T. C. Hoyle for Greensboro College for Women.
Raper & Raper for defendant Armfield.

Brown, J. This action was brought by plaintiffs, who are materialmen, against the contractor Holladay, the Greensboro College for Women, which owned the building, and one Armfield, surety on the contractor's bond. The plaintiffs were awarded judgment against the college, the owner of the building, for the amounts of their claims, and the college was awarded judgment against the surety, Armfield, for the amount it is compelled to pay the plaintiffs. The controversy is between the college and the defendant Armfield, surety upon the bond of Holladay, the contractor.

These facts were found by the referee and adopted by the court. Briefly stated, they are:

Greensboro College for Women contracted with M. L. Holladay to erect for it a dormitory building. The contractor executed to the college a bond, with Armfield surety, conditioned as follows:

"Now, therefore, the condition of the above obligation is such that it the above bounden, M. L. Holladay, shall construct said building in accordance with said contract, plans, and specifications heretofore designated, and shall supply such labor and material as is named in said contract, and shall fully indemnify and save harmless Greensboro College for Women for all costs and damages which it may suffer by reason o said Holladay's failure to do so, and shall fully reimburse and pay t said Greensboro College for Women all outlay and expenses which i may incur in making good said default (which outlay and expense shal include attorney's fees and increased compensation of architect, if o account of such default said college shall be compelled to employ counsel to defend itself, or pay additional compensation to the architect); then, in such case, this bond shall be null and void; otherwise, to be in full force and effect."

The contractor completed the building according to contract, and college accepted the same.

Upon completion of the building, Holladay, the contractor, gave to the college a complete statement of amounts and persons to whom he was indebted for material, giving names of plaintiffs.

After this notice the college made up settlement with Holladay, and found it was due him $4,800, which was more than the amount he owed for material, as per his statement.

The college then paid this amount to the contractor Holladay, and he failed to apply the money to the materialmen.

The plaintiffs, the materialmen, make no claim against the surety upon the contractor's bond. Under the statute they obtained judgment against the college, the owner of the building, and their claims were properly declared a lien thereon. The question presented upon this appeal is this: Can the college compel Armfield, the surety on the contractor Holladay's bond, to make good to it the sum it is required to pay the plaintiffs on account of its failure to retain the money when settling with the contractor.

We are of opinion that the college cannot recover against the surety on the contractor's bond, upon two grounds:

1. The liability sought to be enforced does not come within the terms and conditions of the bond. The bond provides that the contractor Holladay shall construct the building in accordance with the contract, plans and specifications furnished, and shall supply such labor and material as is named in the contract, indemnify and save harmless the college from all costs and damages which it may suffer by reason of said Holladay's failure to do so. The bond further provides that the surety shall fully reimburse and pay to said college all outlay and expenses which it may incur in making good said default. According to the admitted facts, Holladay has fully complied with every one of the conditions named in the bond. He has constructed the building in accordance with contracted plans and specifications. He has supplied the labor and the kind of material specified in the contract. There is nothing required of Holladay in the language of that bond which, so far as the college is concerned, Holladay has not performed. He completed the building according to contract and the college accepted the same. Holladay gave to the college the full statement of the amount and persons to whom he was indebted for material, giving the names of the plaintiffs who are materialmen. After receiving this notice, the college had a full settlement

with Holladay, and found that it owed him $4,800, which is more than the amount he owed for material. The college then voluntarily, without any sort of compulsion, paid this money to Holladay, trusting to him to apply the money to the satisfaction of the claims of the materialmen, which Holladay failed to do. It is thus evident to us, from the facts as found, that Holladay has fully performed the contract, and that, under the terms of the bond, the college cannot recover of the surety.

2. The second ground, which we think bars a recovery, is equally as strong.

The contention of the surety is that under the express terms of the law the owner was required, upon settlement with contractor and upon notice from the contractor, to withhold payment from contractor, and pay directly to materialmen the amounts due them.

The college having, after notice, in violation of the provisions of the law, paid to Holladay, cannot now recover, for its wrongful payment, of the surety.

The law requires the contractor, before receiving the contract price, to furnish a statement of persons and amounts he owes for material. Pell's Revisal, sec. 2021.

When a statement was made, as was done in this case, the law provides: "It shall be the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such person for material, which said amount the owner shall pay directly to the person furnishing material." This section was amended, Laws 1913, ch. 150, sec. 4, by adding thereto: "And after notice herein provided for, no payment to the contractor shall be a credit on or discharge of the lien herein provided."

The contention that the statute was not enacted for the benefit of the surety cannot be maintained. It was enacted primarily for the protection of materialmen and laborers upon the building, but it also protects the owner of the building as well as the surety upon the contractor's bond. When a statute provides a duty, and a contract is made involving a performance of that duty, the statute becomes part of the contract. 13 Corpus Juris, 560, sec. 523; *N. P. R. R. Co. v. Wall*, 241 U. S., 523. This statute existed at the time of making the contract between the college and the surety Armfield. It entered into and formed a part of it for the benefit and protection of all the parties. *O'Kelly v. Williams*, 84 N. C., 281; *Graves v. Howard*, 159 N. C., 594. The provisions of the statute are plain and explicit, and all persons entering into building contracts, including the surety, are supposed to contract with reference to existing law. In this case it was the plain duty of the college to withhold the sum necessary to pay these materialmen, as the law directed that the college retain the money and pay it to the person to whom it was due. When it paid the money to Holladay, instead of retaining it when it had full notice of the existence of claims of the materialmen, it was a direct violation of its duty and it would be inequitable to allow the college to take advantage of its own wrong and compel the surety to make good the default. He had a right to assume that the college would obey the statute, retain the money, and apply it to the claims of the materialmen. When the college paid the money belonging to the materialmen over to Holladay, trusting him to settle with the materialmen, it made Holladay its agent for that purpose, and whatever loss is sustained, it must bear. It is elementary that a principal is not allowed to surrender the security which it holds for the performance of a bond, and then hold the personal surety on the bond liable for it. The principal would have to account for the value of the property wrongfully surrendered. Upon this principle a principal in a note cannot release one of the sureties without releasing all. A mortgagor may not cancel the mortgage and still hold the surety upon the note secured in the mortgage. It is well settled that where the creditor, without consent of the surety, parts with a fund which he has the right to apply in satisfaction of an obligation, the surety on the bond is exonerated to the extent of the value of such fund. The reason is that the fund is impressed with a trust for the payment of the debt, and the creditor is bound to apply it for the benefit of the surety. *Carriage Co. v. Dowd,* 155 N. C., 307.

In *Cooper v. Wilcox,* 22 N. C., 90, it is said: "Between the creditor and a surety, the former is not bound to active diligence to protect the latter; but if by his act he deprives him of a security, the latter is *pro tanto* discharged." *Bell v. Howerton,* 111 N. C., 69; *Purvis v. Carstaphan,* 73 N. C., 575.

According to law, as well as under the terms of the building contract, the college had the right, and it was its duty, to retain this money and apply it to the payment of the materialmen. It failed to do so, but paid it over to Holladay and trusted him to discharge these claims. The college cannot now take advantage of its own wrong. Having failed to perform its duty, it must bear the resulting loss.

Reversed.

JOSEPH H. VINCENT v. JAMES PACE.

(Filed 29 October, 1919.)

Slander—Ambiguous Language—Questions for Court—Questions for Jury—Trials—Demurrer.

When the words alleged to have been slanderously spoken are unambiguous in their meaning, it is for the court to decide whether they admit of a slanderous interpretation; and for the jury to decide whether they were slanderous to the reasonable apprehension of the hearers, when such words are ambiguous; and it is held, under the circumstances of this case, the words alleged to have been slanderously spoken by the defendant, that plaintiff's wife told defendant that the plaintiff had shut up defendant's chickens and instead of turning them out, at her request, had taken them off and sold them, are sufficient to be submitted to the jury to determine whether, within the reasonable apprehension of the hearers, they charged the plaintiff with the larceny of the defendant's chickens, and a demurrer is bad.

CIVIL ACTION for slander, tried before *Stacy, J.*, at September Term, 1919, of ALAMANCE.

On the call of the cause defendant was allowed to withdraw his answer and demur to the complaint. Judgment sustaining the demurrer, and the plaintiff excepted and appealed.

W. H. Carroll for plaintiff.
Long & Long and Parker & Long for defendant.

HOKE, J. The complaint, after alleging that Mrs. Sinclair Vincent having become suddenly ill, and continued so until she presently died, defendant had been called to the home as a near neighbor, and thereupon the pertinent facts were further alleged as follows:

"4. That thereafter, to wit, on the 27th day of December, 1918, the defendants James Pace, contriving to injure the plaintiff in his reputation, and to expose him to public hatred, ridicule, and contempt, did falsely and maliciously speak and utter to one Annie Turner Vincent, and to divers other persons, of and concerning plaintiff certain false, defamatory, and scandalous words, as follows:

"'That when he reached the home of the plaintiff on the night of August 23, 1918, Mrs. Lucinda Vincent called him to her and told him that she was greatly troubled about the defendant's chickens, which she said she and her husband had shut up, and she whispered this in his ear, and told him to have them turned out; but that this plaintiff, instead of turning them out, had taken them off and sold them,' thereby intending to charge, and did charge, the plaintiff with the larceny of said chickens.

"5. That said statement, and every syllable of it, was absolutely false and defamatory, and that by reason of speaking thereof as aforesaid, the plaintiff has been injured in his reputation, fame, and good name, to his damage ten thousand dollars.

"Wherefore, plaintiff prays judgment against the defendant for the sum of ten thousand dollars, for the cost of this action, and for such other and further relief as he is entitled to receive."

In several decisions of the Court in which this question was directly considered, it was held that when the words spoken are ambiguous and fairly admit of a slanderous interpretation, it is then a question for the jury to determine on the sense in which the words were used, and whether they amounted to the slanderous charge to the reasonable apprehension of the hearers. *S. v. Howard,* 169 N. C., 312; *McCall v. Sustair,* 157 N. C., 179; *Reeves v. Bowden,* 97 N. C., 30; *Lucas v. Nichols,* 52 N. C., 32.

In *S. v. Howard,* indictment for slandering an innocent and virtuous woman. Defendant had said, referring to the prosecutrix, "That he had quit his old girl; that Luther Mills was going with her now; she was not a lady; was nothing but a crook, and he could prove it." Held a question for the jury as to the sense in which the words were uttered, and the Court quotes with approval from 25th Cyc., as follows:

"It is the province of the Court to determine what constitutes libel or slander abstractly. Hence, if the language is plain and unambiguous, it is a question of law whether or not it is libelous or slanderous. But, if the language is ambiguous and susceptible of two meanings, one defamatory and the other not, it is for the jury to decide in what sense it was used; however, it is for the court to determine whether or not the language, on its face, is capable of a double meaning, and should be submitted to the jury for construction. It is the duty of the court to say whether a publication is capable of the meaning ascribed to it by the innuendo, but when the court is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it."

In *McCall v. Sustair,* civil action for slander, 157 N. C., 178, *Chief Justice Clark,* delivering the opinion, it was held that the words did not amount to an unequivocal charge of larceny, and being capable of different construction, the question was properly left to the jury to determine. And so, in *Reeves v. Bowden,* the defendant, in speaking of the burning of certain houses, said of and concerning plaintiff: "That damned scoundrel knows all about it from beginning to end." It was held the words, being ambiguous, "but permitting of a slanderous interpretation, the jury should determine under all the circumstances what meaning was intended." And to the same effect is *Lucas v. Nichols.*

Applying the principle as approved and illustrated in these and other like cases, we are of the opinion that, considering the language, the manner and circumstances under which it was first spoken to the defendant, and the way it is charged to have been repeated, the words, as alleged in the complaint are capable of the construction that defendant charged and intended to charge the larceny of the chickens and the cause must be referred to the decision of the jury. There is error.

Reversed.

J. DICKSON McLEAN, COMMISSIONER, EUGENE BOND, VICTOR BOND, ALLEN BOND, R. S. BOND, EXECUTOR AND TRUSTEE, ETC., AND W. LENNON, GUARDIAN, ETC., v. S. F. CALDWELL.

(Filed 12 November, 1919.)

1. **Wills—Devises—Contingent Limitations—Sales—Reinvestment—Statutes.** Lands devised for life with contingent limitations over may be sold for reinvestment under the provisions of Revisal, 1590, and effected under the court's order, subject to its future approval of the sale, when it is made to appear that the best interest of all parties so require, those living and in present interest are represented in person, and unborn children by guardian *ad litem.*

2. **Same—Purchaser—Application of Funds.** A purchaser of devised lands affected with a life estate and contingent limitation over, sold for reinvestment under the provisions of Revisal, 1590, is not ordinarily charged with the duty of looking after the proper disposition of the purchase money, and upon paying it into court, under its order, he is quit of further obligation concerning it.

CONTROVERSY without action, heard before *Calvert, J.,* at September Term, 1919, of ROBESON.

The controversy is to determine the right to enforce collection of a bid for real estate, sold for reinvestment under section 1590 of Revisal. There was judgment that the title offered was a good one, and that the defendant, the purchaser at judicial sale, comply with his bid.

Defendant excepted, and appealed.

McLean, Varser, McLean & Stacy for plaintiffs.
McIntyre, Lawrence & Proctor for defendant.

HOKE, J. The facts pertinent to the inquiry and showing the action of the Superior Court thereon are very satisfactorily stated in the appellant's brief filed in the cause, and are as follows:

"Fannie Peterson, owner in fee simple of a lot in the business portion of lumberton, died leaving a will wherein she devised said lot to Eugene Bond for life, with remainder in fee to his oldest daughter, if any, or if no daughter, then to his oldest son, or should he die without issue, then to Allen Bond in fee simple. In said will she also directed her executors to purchase another lot, adjoining the lot then owned by her, the title to which lot, when so purchased, to be held for the same persons and subject to the same conditions and limitations as set forth in the will with respect to the lot owned by her at her death. Pursuant to such direction, her executor acquired title of said lot, and the two lots together, embracing one acre of land, which is the subject of this action.

"Eugene Bond, the life tenant, is living and above the age of 25, but is unmarried. The contingent remaindermen, Victor Bond and Allen Bond, are living, above the age of 21, but are unmarried.

"In 1917 Eugene Bond, the life tenant, instituted an action in the Superior Court of Robeson County to have said land sold for reinvestment under section 1590 of the Revisal. Victor Bond, Allen Bond, R. S. Bond, executor of Fannie Peterson, and the unborn children of Eugene Bond, Victor Bond, and Allen Bond, were defendants in this action, and summons was duly served upon them. Upon application, the judge appointed a guardian *ad litem* to represent the unborn children of the life tenant, and devisees and all contingent remaindermen. A verified complaint was filed alleging that the land was in the business district of Lumberton and too valuable to be used for residence purposes; that there was only one small dwelling on the land, and there was no appreciable revenue therefrom; that the life tenant and living contingent remaindermen were without funds to pay taxes or improve the property, or to pay inheritance taxes assessed, and that the best interest of all concerned would be subserved by a sale for reinvestment. The guardian *ad litem* filed answer admitting the allegations of the complaint. At December Term, 1917, Judge Bond entered a decree of sale, appointing J. Dickson McLean as commissioner, and authorizing him to secure private bids and submit same to the court. Thereafter, S. F. Caldwell, defendant in this action, addressed a written bid to the commissioner, offering him $25,000 for a 'good, perfect, and indefeasible title in fee simple' to said lands. The commissioner filed report recommending the acceptance of this bid, whereupon, at September Term, 1919, his Honor, Judge Calvert, signed a decree authorizing acceptance of the bid and directing the commissioner to execute a deed conveying said land to the purchaser in fee simple upon payment of the purchase money, the decree further providing that the proceeds of sale should be deposited in bank at interest until such time as a decree for reinvestment of the proceeds of sale could be entered. The commissioner thereupon tendered a deed in the usual form of a commissioner's deed to said Caldwell, who declined to accept same or pay the purchase money, for that he was advised by counsel that there was doubt as to the power of the court to decree a sale of said lands, and for that there was doubt as to whether, upon the face of the record of said proceedings, the deed of the commissioner would convey a good, perfect, and indefeasible title in fee simple to said lands.

"This action was thereupon instituted by the commissioner, and the living devisees and executor of Fannie Peterson, against said S. F. Caldwell for the purpose of requiring said Caldwell to comply with his bid, receive the deed from the commissioner, and pay the purchase money. There being no dispute whatever as to the facts, the cause was submitted to the court below upon a case of agreed facts. The court being of opinion that upon the face of the record the court had the power to decree a sale of said lands, and being of opinion that the deed of the commissioner would pass a good, perfect, and indefeasible title in fee simple to the purchaser, judgment was entered requiring defendant to comply with his bid and pay the purchase money, to which judgment defendant excepted and appealed."

In several recent cases before us, the questions presented were fully and directly considered, and the decisions are in full support of his Honor's ruling in the premises. *Dawson v. Wood,* 177 N. C., 159; *Pendleton v. Williams,* 175 N. C., 248; *Thompson v. Rospigliosi,* 162 N. C., 145.

From a perusal of these cases, and the authorities cited therein, it will clearly appear: (1) That, on the facts presented, the court had full power to order a sale for reinvestment under the statute; (2) that the same can be effected by private negotiation, subject to the approval of the court, when it is properly made to appear that the best interest of all the parties so requires. This was the course pursued and directly approved in *Dawson's case, supra.* (3) That ordinarily, and on the facts of this record, the purchaser is not charged with duty of looking after the proper disposition of the purchase money, but, when he has paid his bid into court, or to the parties authorized to receive it by the court's decree, he is "quit of further obligation concerning it." *Dawson v. Wood, supra; Pendleton v. Williams, supra,* and, as said further in the *Dawson case,* the proper care and safety of the fund can be provided for in the final decree.

It may be well to call attention to two recent statutes in reference to the care and proper investment of funds arising by reason of these sales for reinvestment. Laws 1919, ch. 17; Laws 1919, ch. 259.

On the record, the judgment of the Superior Court is
Affirmed.

JUANITA W. SHAW v. CITY OF GREENSBORO.

(Filed 12 November, 1919.)

1. **Municipal Corporations—Cities and Towns—Waters—Surface Waters—Extraordinary Rains—Evidence—Instructions.**

Where a city has been negligent in the construction of a street and maintaining a pipe it had laid in the ground under plaintiff's dwelling for carrying off the water, causing damage to the plaintiff's home, testimony that it was the result of a rainstorm of unusual size for that section of the country is not sufficient to sustain a requested instruction to find for the defendant if the damages were occasioned by an extraordinary rainfall in the community, the word "unusual," as to the character of the storm, implying that such storms had previously occurred, and not meeting the requirement that they may have not been reasonably anticipated in the future.

2. Same.

Where there is evidence that on other occasions the plaintiff's dwelling had been damaged by the negligence of the defendant city in not properly providing for an overflow of surface water, a requested instruction to find under the evidence for defendant, if on one occasion the damages were caused by an extraordinary rainstorm, is properly refused.

3. Municipal Corporations—Cities and Towns—Waters—Surface Waters—Drains—Damages—Plaintiff Minimize Damages.

Where damage is sought by the plaintiff by reason of surface water flowing into his dwelling, caused by a hole in a drain pipe, which it was the duty of the defendant city to have properly fixed and maintained, the plaintiff was not required to minimize his damage by fixing the pipe, at his own expense.

APPEAL by defendant from *Lane, J.*, at the February Term, 1919, of GUILFORD.

This is an action to recover damages alleged to have been caused by the negligence of the city of Greensboro in the improvement of certain streets, and in the diversion of surface water, and also by leaving open a certain pipe in the basement of plaintiff's house. The jury returned a verdict of $750 for plaintiff, upon which the court rendered judgment, and the defendant appealed.

The evidence tended to show that in 1915 or 1916 defendant improved North Elm Street by resurfacing it with asphalt, which raised the surface two or three inches; that the curbing on either side of said street was not raised; that the city, in the improvement of said streets, diverted and collected surface water, which was thrown upon the lot of plaintiff. Plaintiff's house was built upon a lot that had been filled in, and under the house pipes were laid, in which was originally a ditch or branch; that these pipes carried surface water from a considerable watershed above; that on one occasion, when these pipes became stopped, hands of the city had gone into plaintiff's basement to unstop the pipes and a hole was left in the pipes, which, plaintiff's witnesses testified, was broken by the city hands, whereas, witnesses for the defendant testified that this pipe was broken by the plaintiff at the time she built her dwelling for the purpose of draining her basement. Plaintiff complained that through this hole water ran into the basement and did considerable damage to her property. The basement had no floor and was not waterproof.

The evidence is not stated in greater detail because there was no motion for judgment of nonsuit and no request to direct a verdict.

The defendant asked the court to instruct the jury as follows:

"If you should find from the evidence in this case, and by its greater weight, that the city of Greensboro has, under the direction of a competent engineer, constructed sufficient catch basins and drains to take care of the diverted surface water that might be reasonably anticipated on North Elm Street, if any has been diverted, and if you should further find that on the occasion complained of by plaintiff there was any damage to her from surface water, and such damage resulted from surface water occasioned by an extraordinary rainfall in the community, then the defendant would not be liable to plaintiff for such injury, and it would be your duty to answer the first issue 'No.' "

This instruction was refused except as given in the charge, and the defendant excepted.

"The court charges you that it is a general principle of law that where one is injured by the act of another, it is his duty to do what reasonable care and business prudence requires to minimize the loss; and if you find in this case that city had broke in the pipe in plaintiff's basement, and that plaintiff could, at small expense, have repaired the broken pipe, it was her duty to have done so and reduced her damage so far as possible."

The instruction was refused and defendant excepted.

The question involved in the last prayer was also raised by exceptions to the refusal to admit certain evidence.

J. A. Barringer and R. C. Strudwick for plaintiff.
Charles A. Hines for defendant.

ALLEN, J. There is no evidence upon which the first prayer for instruction can be predicated, as the only reference to an extraordinary rainfall in the record is that several witnesses testified that they went to the house of the plaintiff in the summer of 1916 and saw a large quantity of water in the basement, and that the occasion to which they referred was at the time of a rainstorm of unusual size for this section. They also testified that they had seen water standing about the house at other times when the rainfall was moderate, and usual in quantity.

"An 'unusual flood of rain' does not indicate a greater or more severe rain than has theretofore occurred, but rather such a rain as does not usually, or but rarely occurs" (*Denver v. Rhodes*, 9 Cola, 564), and it was the duty of the defendant to provide for such heavy rains as might reasonably be anticipated, although not of frequent occurrence. *Wright v. Wilmington,* 92 N. C., 159; *Emry v. R. R.,* 102 N. C., 226.

In the last case cited the court approved the following instruction to the jury as to the duty of a railroad to provide culverts of sufficient size to carry off water: "It was the duty of defendant to have constructed its culvert so it would carry off the water of the stream under all ordinary circumstances, and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the right of grant, actual or presumed, to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances (and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional, and by reason of insufficient culvert the plaintiff's land was overflowed, the answer to the first issue should be 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land," and the same principle is applicable to the defendant.

Again, the instruction could not have been given in any event, because it required the jury to answer the first issue—Was the plaintiff's property damaged by the negligence of the defendant, as alleged in the complaint?—"No," if there was an extraordinary rainfall on one occasion causing damage, and to ignore evidence of damage at other times, when the rainfall was moderate.

The general principle, embodied in the second prayer for instruction, is fully recognized, that the injured party should do what reasonable care and business prudence requires to reduce the loss (*Yowmans v. Hendersonville,* 175 N. C., 578), but it has no application where the wrongdoer has the opportunity to remedy the wrong, and avoid damage, and when it would require the expenditure of money by the injured party. *Roberts v. Baldwin,* 155 N. C., 281; *Waters v. Kear,* 168 N. C., 246; *Cardwell v. R. R.,* 171 N. C., 366.

The employees of the defendant could have repaired the pipe at the time they made the hole in it, or afterwards, and it was their duty to do so, and the city cannot escape liability for damages caused by its negligence because of the failure of the plaintiff to expend money to do something it ought and could have done.

No error.

S. R. MORRISON ET AL., COPARTNERS, v. A. H. MARKS.

(Filed 12 November, 1919.)

1. Contracts—Evidence—Lumber—Nonsuit—Trials—Questions for Jury.

Upon allegation that defendant had breached his contract to sell the plaintiff three cars of lumber at a certain price per thousand delivered on cars at a designated place, and demand for damages in a certain sum, the plaintiff's evidence tended to prove he was in the lumber business, employed one S. to buy lumber, and he returned with and delivered to plaintiff a memorandum of contract for the three cars of lumber to be delivered at the certain price and place; that the memorandum he gave to plaintiff had been signed by the defendant; also, the maximum and minimum feet of lumber a car was to contain. *Held*, the evidence was sufficient for the determination of the jury as to the alleged contract, and a judgment as of nonsuit was improvidently entered.

2. Contracts—Breach—Damages—Profits.

Profits on lumber, which defendant had failed to deliver under his contract, are only recoverable when fairly supposed to have been in the contemplation of the parties when making the contract, or naturally expected to follow its breach, being certain in their nature and cause; and in ascertaining them, the relation and business of the parties, the subject-matter, the defendant's knowledge, and other relevant circumstances may be considered. *Johnson v. R. R.*, 140 N. C., 577, cited and approved.

APPEAL by plaintiff from *Lane, J.*, at August Term, 1919, of GUILFORD.

This is an action to recover damages for breach of contract.

At the conclusion of the evidence his Honor entered judgment of nonsuit and the plaintiff excepted and appealed.

John A. Barringer for plaintiff.
King & Kimball for defendant.

ALLEN, J. The plaintiff alleges that on 10 January, 1917, the defendant contracted to sell him three cars of gum lumber for $12 per thousand, and to deliver the same on the cars at Chapel Hill, and that the defendant failed to perform said contract to his damage $360.

These allegations are denied by the defendant.

The plaintiff introduced evidence tending to prove that he was in the lumber business; that M. S. Satterfield was in his employment; that he sent Satterfield out to buy lumber and he returned and delivered to him memorandum of contract for three cars of gum lumber to be delivered at Chapel Hill for $12 per thousand, signed by the defendant.

Satterfield testified that he went to the home of the defendant and saw him, and said, among other things, "I bought the three cars of gum. That is a copy of the contract that he signed."

There was also evidence as to the minimum and maximum number of feet in a car of lumber, and that the defendant had failed and refused to deliver any of the lumber.

The credibility of this evidence was for the jury, and, if believed, it establishes a valid contract and a breach by the defendant, which would entitle the plaintiff to recover at least nominal damages. *Hassard-Short v. Hardison,* 114 N. C., 486.

The measure of damages is not now before us, but it is well to note that profits cannot be recovered as damages except subject to two conditions, "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." *Wilkinson v. Dunbar,* 149 N. C., 23.

In ascertaining what damages come within the rule, it is proper to consider the relation of the parties, the subject-matter of the contract, the business of the parties, the knowledge of the defendant, and other relevant circumstances. *Johnson v. R. R.,* 140 N. C., 577.

Reversed.

C. A. HAMLIN v. C. J. CARLSON, E. L. COX, AND W. P. LOVE.

(Filed 12 November, 1919.)

1. **Statutes—Amendments—Interpretation.**

Acts amendatory to former acts of the Legislature are construed therewith as one and the same statute.

2. **Same—Chiropractics—Board of Examiners—Discretion—Courts—Mandamus.**

Chapter 73, Public Laws 1917, establishing a board of chiropractic examiners, gives this board large discretionary powers to examine and license applicants to practice this science, and to pass upon their other qualifications specified therein; and, construed with its amendatory act of 1919, ch. 148, under sec. 2, it is provided that those practicing chiropractics in this State prior to 1918 may receive their license upon proof of good character and proper proficiency upon examination; it is also provided that those so practicing prior to 1917 shall be granted a license without examination. *Held,* neither the proviso of the Laws of 1918 or 1917 dispenses with the discretionary power of the board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been *bona fide* practitioners for the requisite time, into which the courts will not inquire, and a mandamus will not lie.

CIVIL ACTION, applying for a writ of mandamus to compel defendants, composing the State Board of Examiners for licensing practitioners of chiropractic in this State, to issue a license to plaintiff, authorizing him to enter on said practice. Certain facts pertinent to the inquiry are embodied in the judgment as follows:

"1. That the defendants constitute the State Board of Chiropractic Examiners, being created and established by the acts of the General Assembly of North Carolina, Public Laws 1917, ch. 73, as amended by chapter 148 of the Public Laws 1919, and as such board are vested with all the powers and duties as prescribed by said acts, among others, being the duty of examining such applicants for the practice of chiropractic as may present themselves to the aforesaid board, as provided for by the acts creating it, and shall issue a license for the practice of chiropractic to such applicants as they may deem entitled under the several provisions of said acts to receive license enabling them to engage in such practice.

"2. That among other provisions of the said acts creating the Board of Chiropractic Examiners, section 2, chapter 148 of the Public Laws of 1919, contains the following: '*Provided,* that any person who had been practicing chiropractic in this State prior to the first day of January, one thousand nine hundred and eighteen, may apply and receive license to practice chiropractic in this State upon proof of good character and proper proficiency upon examination.'

"3. I find as a fact that the plaintiff made application to the defendants, in their capacity as examining board, to be granted a license to practice chiropractic within this State.

"4. I find as a fact that the said defendants, State Board of Chiropractic Examiners, upon considering the application of the plaintiff, in the exercise of their discretion, refused to grant license to the said plaintiff to engage in the practice of chiropractic within this State."

His Honor, being of opinion that the questions presented involved the exercise of discretion on the part of defendant board, entered judgment denying the application, and the plaintiff excepted and appealed.

L. B. Williams and T. J. Gold for plaintiff.
Jerome & Scales for defendant.

HOKE, J. Under chapter 73, Laws 1917, a State Board of Chiropractic Examiners was provided for to be composed of three practicing chiropractors of integrity and ability, resident in the State, and was given certain supervisory powers on the subject, including the licensing of practitioners therein, etc.

In section 5 of said act, the science of chiropractic is defined and the qualifications of applicants for license are set forth requiring, among other things, that the board shall examine all applicants who shall furnish satisfactory proof of good character and of graduation from a regular chiropractic school of good standing, indicating the course, etc. That every applicant shall, immediately after the passage of this act, furnish to said board sufficient and satisfactory evidence that, prior to beginning of his course in chiropractic, he had obtained a high school education, or what is equivalent thereto, entitling him to admission in a reputable college or university. And he shall also furnish sufficient satisfactory evidence that his diploma from a chiropractic college was granted on personal attendance and completion of a course of study of not less than 36 months each, and further specifying a prescribed course of study, etc.

By chapter 148, Laws 1919, the above statute was amended by providing, among other things, that the clause requiring a diploma granted from a chiropractic college on satisfactory proof of personal attendance and completion of a course not less than 36 months, should be stricken out, and, in lieu thereof, requiring the applicant to exhibit to the board or satisfy them that he holds a diploma from a regular chiropractic college and not a correspondence school, and that the same was granted on personal attendance and three-year course in such a college, etc.

The later act contains further amendments, among others, in section 2: "*Provided*, that any person who had been practicing chiropractic in this State prior to first of January, 1918, may apply for and receive license to practice chiropractic, upon proof of good character and proper proficiency upon examination," etc., and a further proviso: "That all those practicing chiropractic prior to January 1, 1917, shall be granted license without an examination," etc.

Construing these acts together as one and the same statute, the proper way to consider and interpret them, *Keith v. Lockhart,* 171 N. C., 451, it will appear that this board, created with a view to fix and conserve the proper standards in the practice of this science, are given very large powers concerning it, and that they are authorized to confer license on worthy applicants when it is shown that they are of good character, have a certificate of a high school, entitling him to admission to a reputable college or university, and hold a diploma from a reputable chiropractic college, given after a personal attendance of three-year course in such college, etc.

1. As to those who were bona fide engaged in the practice prior to 1 January, 1918, the school certificate and the college diploma could be dispensed with, and license should issue on satisfactory proof of good character and proficiency, evidenced by examination under such rules as the board might establish.

2. As to those who were bona fide engaged in the practice prior to 1 January, 1917, the examination referred to in the first proviso should be dispensed with.

Both under the first and second provisos, however, the board are authorized and required to pass upon the character of the applicant, and both from the language and the meaning and purport of the law they are necessarily required to pass on the bona fides of the claim that the applicants had been practicing chiropractic prior to 1 January, 1918, in the one case, and 1 January, 1917, in the other. It is urged for the appellant that, under the second proviso, there is no discretion vested in the board as to those applicants who had been practicing prior to 1 January, 1917. If it were admitted or clearly established or properly found that applicant, being of good character, had been engaged bona fide in the practice of chiropractic prior to date mentioned, there is no discretion in the board as to requiring an examination with a view of showing proficiency, but, on the facts presented, the question cannot be so restricted. True, there is testimony on the part of plaintiff tending to show he was engaged in the practice prior to the date mentioned, but there is strong opposing evidence to the contrary, and, as we have said, both the good character of the applicant and the bona fides of the claim as to practicing at the time alleged are referred to the board's decision. And, in any aspect of the case, therefore, his Honor was clearly right in refusing to direct or control its exercise.

In *Board of Education v. Comrs.,* 150 N. C., 116, it was held: "That a writ of mandamus will not be granted to compel the performance of an act by a public officer involving the exercise of judgment and discretion," to whom its performance is committed by the Constitution and statutes, citing, among other cases, *Ward v. Comrs.,* 146 N. C., 534; *Glenn v. Comrs.,* 139 N. C., 412; *Barnes v. Comrs.,* 135 N. C., 27; *Ewbank v. Turner,* 134 N. C., 77; *Burton v. Furman.* 115 N. C., 166. As appertaining to the legal questions presented, the Court quotes with approval from reputable authors on the subject, as follows:

"In Abbott on Municipal Corporations, sec. 1108, the principle is thus stated: 'To authorize the writ, the duty must be mandatory and the act sought to be coerced ministerial in its nature. If the officer or governmental agency sought to be coerced is vested by law with discretionary powers as to the doing or not doing of the act sought to be coerced, or in the manner of doing it, the writ will not issue.' And in High on Extr. Legal Remedies (2d ed.), sec. 24, it is said: 'But the most important principle to be observed in the exercise of the jurisdiction by mandamus, and one which lies at the foundation of the entire system of rule and principles regulating the use of this extraordinary remedy, is tha which fixes the distinction between duties of a peremptory or mandator nature and those which are discretionary in their character, involvin the exercise of some degree of judgment on the part of the officer or bod against whom the mandamus is sought. . . . And whenever suc officers or bodies are vested with discretionary powers as to the performance of any duty required at their hands, or when, in reaching a give result of official action, they are necessarily obliged to use some degre of judgment and discretion, while mandamus will lie to set them i motion and to compel action upon the matters in controversy, it wi in no manner interfere with the exercise of such discretion or contro or dictate the judgment or decision which shall be reached.' And, agai in sec. 34: 'An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties which are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act, or may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner.'"

The well considered case of *Battle v. Rocky Mount,* 156 N. C., 329, is in recognition of the same principle.

On careful consideration, we find no reversible error to plaintiff's prejudice, and the judgment of Superior Court is

Affirmed.

J. R. GORDON v. PINTSCH GAS COMPANY.

(Filed 12 November, 1919.)

1. **Judgments—Set Aside—Excusable Neglect.**

Where a defendant, known as "The Pintsch Gas Company," has been sued in that name, and failing to answer, a judgment by default and inquiry after the lapse of several years has been taken, and final judgment upon the inquiry thereafter regularly entered, and it thereafter appears that the true name of the defendant was the "Pintsch Compressing Company," but that the summons had been duly forwarded to the president of the "compressing company," who had employed local attorneys to represent his company from the beginning, the judgment may not be set aside for excusable neglect.

2. **Judgment—Correction—Statutes—Motions—Abatement.**

Where a defendant company has transacted business in a locality as the "Pintsch Gas Company," but is in fact the "Pintsch Compressing Company," it may not knowingly conceal its real name until after judgment by default and inquiry has been regularly prosecuted to final judgment, and then successfully resist a judgment on a motion to correct the pleadings, process, and judgment. Rev., 507, its remedy was by motion to abate the action.

3. **Appeal and Error—Judgments—Correction—Statutes—Pleadings—Process—Court's Discretion.**

The provisions of Rev., 507, among other things, allowing the judge or court, before or after judgment, in furtherance of justice, and on such terms as may be proper, to amend any pleadings, process of proceedings, by correcting a mistake in the name of a party, etc., is within the discre-

tion of the Superior Court judge, and not reviewable on appeal in the absence of palpable abuse.

WALKER, J., dissenting; ALLEN, J., concurring in the dissenting opinion.

APPEAL by defendant from *Lane, J.*, at September Term, 1919, of RICHMOND.

This action was instituted against the Pintsch Gas Company in 1913 to recover damages for emptying sewage on the lot of the plaintiff in the town of Hamlet, N. C. Judgment by default and inquiry was taken at December Term, 1913, for want of an answer. At March Term, 1918, the inquiry was instituted, and the jury found, in response to the issue submitted: "What damages, if anything, is the plaintiff entitled to recover of the defendant in this action?" "$2,975." And thereupon judgment was entered for that sum.

On 26 June, 1919, the counsel for the plaintiff gave notice of a motion in due form that at the next term of the Superior Court of Richmond, to be held on Monday, 14 July, 1919, motion would be made in said court that the court should "amend process, pleading, and judgment in the case of J. R. Gordon against the Pintsch Gas Company, so as to read and to be *J. R. Gordon v. Pintsch Compressing Company*, said cause having been tried and judgment rendered at March Term, 1918, of the Superior Court of Richmond." This notice was served on the superintendent and manager of the defendant Pintsch Compressing Company on 2 July, 1919, and affidavits were filed by the plaintiff and others. The plaintiff introduced the record of the judgment by default and inquiry at December Term, 1913, and of the verdict, and final judgment at March Term, 1918.

The affidavit of M. R. Sharpe was filed, that in 1912 and 1913 he was manager and superintendent of the defendant's plant at Hamlet, N. C., and that the summons in this case of *J. R. Gordon v. Pintsch Gas Company* was served upon him, and he immediately sent the copy left with him by the sheriff to the general office of the defendant, who employed resident counsel to represent them; that there was no other plant in Richmond County in the business of manufacturing gas and its allied products in 1912 and 1913, and that the summons was served on him the latter year.

A. B. McDonald filed an affidavit that the plant of the defendant at Hamlet was built about 1897; that the "defendant was always known by the name of and as Pintsch Gas Company; that it was recognized and known at all times by such name; that the first time that this affiant ever knew, or even heard, that the defendant was named Pintsch Compressing Company was after judgment final had been recovered against it in this action"; that M. R. Sharpe was superintendent and manager of the defendant at Hamlet during the years 1912 and 1913, and for many years prior thereto; and that it was the only person or corporation in said county known by the name of either Pintsch Compressing Company or Pintsch Gas Company, and that he has been many years deputy sheriff of Richmond County, and at all times the defendant has been known, recognized, and acting as the Pintsch Gas Company.

The plaintiff, J. R. Gordon, in his affidavit, reiterated the above statement of fact, and added that after the death of the original counsel employed by the defendant in this action had died, the defendant employed another resident counsel to represent it, and that M. R. Sharpe, its superintendent, knew that said action had been brought, and was intended to be brought, against the company which he represented; that it had no other name posted at the entrance of its plant or elsewhere, as its true name, as required by law, and that it was recognized as the Pintsch Gas Company and paid bills and accounts charged against it in such name; that it was the only plant doing such business in said county or owning or operating a line of sewage upon the land of the defendant, and it never made any contention that it "was not sued in the right name" until the statute of limitations had run against the plaintiff's cause of action, although it knew it was the real party sued, and knew of each and every proceeding and move made in said trial thereof, and it has not been misled in any particular herein, being at all times fully informed as to the real and true contention of the plaintiff. The affidavits filed by the defendant's general superintendent (in New York) did not deny any of the above statements, but rested its contention upon the ground that after the summons in the action of the plaintiff against the Pintsch Gas Company was sent to it by the local superintendent, Sharpe, it employed counsel to look after the matter, Major John D. Shaw, and after his death the company retained Mr. John P. Cameron, and added that his recollection was that a second summons had been served in the same action in the name of the "Pintsch Gas and Compressing Company," and that the matter had been left to counsel, and after the death of the second counsel, the defendant employed Mr. Bynum, through whom it is resisting this motion.

The motion was continued from time to time by consent of parties till September Term, 1919, at which term the court rendered judgment "correcting the pleadings, process, and judgment in such matter, by inserting the word 'Compressing' in the name of the defendant Pintsch Gas Company, instead of the word 'Gas,' and thereby correcting the same to name the true defendant, Pintsch Compressing Company, who was in court under process issued, and was represented from the time of the institution of said action until final judgment was signed, and until the present time, and it further appearing to the court that said motion, notice, and other processes were made, served, and properly executed," it was decreed that the motion should be granted, and that "said process, pleadings, issues, and judgment be and the same, and each thereof, is amended by inserting the word 'Compressing' instead of the word 'Gas,' making the name of defendant read 'Pintsch Compressing Company,' instead of 'Pintsch Gas Company.'" From this judgment the defendant appealed.

Lorenzo Medlin for plaintiff.
Fred W. Bynum for defendant.

CLARK, C. J. The defendant, upon its own showing, failed "to give the matter that amount of attention which a man of ordinary prudence usually gives to his important business," and therefore would not be entitled to set aside the judgment for excusable neglect, even if such motion had not been barred by the lapse of more than a year. *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 394, and citations thereto in Anno. Ed.

The case stands, therefore, upon the power of the court, in its discretion, to allow the amendment asked for. Rev., 507, provides that the "Judge or court may, before and after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect," etc. The language of the statute itself shows that this is a discretionary power, and it has always been held that the granting or refusal of amendments in the cases named is not reviewable by appeal except in cases of palpable abuse. See citations to Pell's Revisal, sec. 507. Also, *Sheldon v. Kivett,* 110 N. C., 411, and cases there cited.

The evidence in this case fully warranted the findings of fact in the judgment, and the grant of the leave to amend. There is no question upon the affidavits on both sides that the Pintsch Compressing Company was the party charged with committing the tort sued on; that the general manager of the compressing company was served with summons; that he sent it to the general office in New York, which employed counsel, and at his death employed another counsel, and later, on the death of the latter counsel, employed another; that the company sued was known generally by the name mentioned in the summons, which is held sufficient, even as to defendant's in an indictment, subject to plea in abatement in which the defendant must give its true name. The general manager in New York, in his affidavit, states that his recollection is that a second summons was served, giving the name of defendant as the "Pintsch Compressing and Gas Company." There is no indication that the defendant suffered any prejudice by reason of the misnomer, and it has waived any objection by not giving its true name by plea in abatement.

"A misnomer does not vitiate provided the identity of the corporation or person with that intended by the parties is apparent, whether it is in a deed, *Asheville Division v. Aston,* 92 N. C., 584, or in a judgment, or in a criminal proceeding, *McCrae v. Starr,* 5 N. C., 252."

The judgment by default and inquiry in December, 1913, and the judgment final in March, 1918, upon the verdict of the jury, were both taken regularly "according to the course and procedure of the courts." There is no question that this appellant had the fullest knowledge that the action was against itself, and that it had the amplest opportunity to defend.

The amendment rested in the discretion of the court.

Affirmed.

WALKER, J., dissenting: There was no serious denial by the defendant of the right to have the record amended by inserting the correct name of defendant for the incorrect one—that is, the compress company for the gas company, two names radically different in pronunciation and not coming under the rule of *idem sonans.* The power of amendment was not the real point raised by the defendant, but his right to answer, if the power was exercised and the amendment made. My opinion is that he should have been granted that right. If the plaintiff could enforce his judgment, the amendment was not necessary, and the fact that it was made shows that plaintiff and the court considered it necessary in order to enforce the judgment. It was, therefore, a material amendment, and not merely formal. The plaintiff was asking for a favor from the court, and when he received it, it does not come with good grace from him to question defendant's right to be heard. But I do not regard it as a mere favor the defendant is asking of the court, but a right to which he is entitled. In *Atwood v. Landis,* 22 Minn., 558, the Court went beyond the position I now take and held the judgment in a similar case to be void, the process not having been served on the party by his right name. It is not necessary that we should go so far, as defendant only asks leave to answer. The facts of that case were precisely like those in this record, as the man upon whom the summons was served was the one who owed the debt. *Farnham v. Hildrich,* 32 Barbour (N. Y.), 277, is directly in point. It was decided as follows:

"1. The judgment and execution must describe the party whose property is sought to be taken, and it is not enough that the right man is made to pay a debt.

"2. The sheriff can only execute the process against the person or property of the individual named.

"3. Where a defendant, sued by a wrong name, fails to appear in the action, he does not waive his right to object to the misnomer, after judgment and execution," citing many authorities.

This decision was approved in the *Minnesota case*, which we cited above. See, also, *Cole v. Hindson*, 101 English Rep. (Reprint), 528 (S. C., 6 Term Rep., 234). All these cases decide beyond any doubt that if plaintiff is permitted to amend, the defendant should be allowed to answer or demur as if there had been no judgment.

But, aside from authority upon this question, it would seem to be fair and just that defendant should be allowed to answer to the merits. If plaintiff's amendment is necessary in order that he may enforce the judgment, it is substantial, and no reason, in that view, can be discovered why defendant should not be entitled to plead or answer in the case, the judgment being set aside for that purpose. The defendant was not by the law called upon to answer a defective complaint filed under defective process, nor was it required to come into a suit, appear, and plead when it had not been properly summoned to do so. When process was served upon the compress company, even if the same was defective, it had the right to retain counsel to investigate and protect its interests, and this cannot be used to its prejudice. A person would be very imprudent and unwise to pursue any other course. It did not appear because it was not required to do so, and waive its rights in favor of the plaintiff. If one is served with process by one name, he is not bound to answer if that is not his true name, but is quite different. He is not bound to correct the plaintiff's, or the sheriff's, mistake. It appears, or at least was stated in the argument, that the lot in question was not worth over $700, and the plaintiff offered to sell it for $800, and yet the damages were assessed at four times that much, or $2,975. This is a large recovery in any case, but especially so, and also a very unjust one, when the defendant has properly had no day in court. A plaintiff must not only intend to sue the one whom he alleges to be liable to him, but he must actually do so, and a suit against the gas company is *not* a suit against the compress company. *Hassell v. Daniels, etc., Steamboat Co.*, 168 N. C., 296.

The judgment by default and inquiry was rendered at December Term, 1913, and the inquiry was not executed until March Term, 1918. In the meantime, the two attorneys who represented the defendant successively in Richmond County for many years have died.

ALLEN, J., concurs in this dissenting opinion.

HEZEKIAH KORNEGAY AND VIRGINIA KORNEGAY v. EDEN PRICE.

(Filed 12 November, 1919.)

Husband and Wife—Deeds and Conveyances—Statutes—Void Deeds—Color—Adverse Possession—Limitation of Actions.

The possession of lands by the husband under a deed made to him by his wife, void for noncompliance with Rev., 2107, is for the benefit of the wife, and during the continuance of the marriage relation during her life cannot be considered as adverse to her and ripen title in him by sufficient adverse possession. *Semble,* after her death his possession would be adverse possession against her heirs; and *quære* as to whether it would be such before demand is made for possession.

CIVIL ACTION, tried before *Guion, J.*, at March Term, 1919, of DUPLIN, upon these issues:

"1. Is the plaintiff the owner of the lands described in the complaint? Answer: 'Yes; second tract only.'

"2. Does defendant wrongfully withhold the same from the plaintiff? Answer: 'Yes; as to second tract.' "

Judgment for defendant, and plaintiffs appealed.

John A. Gavin, Jr., for plaintiffs.
Stevens & Beasley for defendant.

BROWN, J. It is admitted that Margaret Price was the owner in fee of the land in controversy, and that the plaintiff is her only heir at law. Margaret Price was the wife of the defendant, Eden Price. They were married prior to 15 May, 1897, and lived together as man and wife until 18 July, 1916, when Margaret Price died. No children were born of said marriage. On 15 May, 1897, Margaret Price executed to her husband, the defendant, a deed, which was void under Rev., 2107. The defendant claimed that this deed was color of title, and that he had had adverse possession against his wife of the 44½-acre tract for a period sufficient to ripen the color into a good title. The court directed the jury that the plaintiff was not entitled to recover the 44½-acre tract of land; that if the evidence is to be believed, he acquired title by color of the deed from his wife, and by adverse possession against her.

We think the learned judge erred in holding that the husband can acquire the wife's land by adverse possession under color of title. It is admitted that the deed of Margaret Price to the defendant is void, because not probated in accordance with the statute, and that it did not pass the title.

It seems to be well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. But where the marital relations have been terminated by divorce or abandonment, it seems that one may acquire title from the other by adverse possession. 1 A. and E., p. 820, sec. 11.

In *First National Bank v. Guerra,* 61 Calif., 109, it is held that a wife cannot claim adversely to her husband, or those claiming under him, so long as he remains the head of the family. It is held further, in *Hendricks v. Rasson,* 53 Mich., 575, that the husband cannot hold adversely to his wife premises belonging to her. Joint possession by husband and wife, held under the wife's claim of title, inures to her benefit. *Templeton v. Twitty,* 88 Tenn., 595. In *Vandervoort v. Gould,* 36 N. Y., 639, it is held that the possession of premises by husband belonging to his wife can, in no sense, be deemed adverse. In the note to A. and E. Ency., *supra,* a large number of cases is cited sustaining the text. See, also, Am. and Eng. Anno. Cases, 1912, A., p. 570, and notes.

The possession of the husband of land conveyed to him by the wife under a void deed becomes adverse only after her death and against her heirs. *Burkowitz v. Brown,* 23 N. Y. Supp., 792. There are authorities which hold that the possession of the husband does not become adverse against the wife's heirs until a demand is made for possession. See, also, 1st R. C. L., 755, sec. 83, where it is said: "It is well settled that neither a husband nor a wife can acquire title by adverse possession as against the other of land of which they are in the joint possession."

The judgment of the Superior Court is reversed.

New trial.

IN RE ESTATE OF CHARLES W. SKINNER.

(Filed 12 November, 1919.)

Descent and Distribution—Personal Property—Half Blood—English Law—Statutes.

Our statute on the subject of the distribution of personal property is substantially similar to the English law on the subject, and it is held, in conformity with the English decisions thereon, that the distribution of personal property among the collateral relations of the deceased ancestor is equal among those of his whole and half blood.

CONTROVERSY without action, heard before *Allen, J.*, at March Term, 1919, of WAKE.

The controversy is to determine the rights of respective claimants of the whole and half blood to participate in the personal estate of Charles Worth Skinner, deceased intestate, and now in the hands of Joseph B. Cheshire, Jr., administrator.

There was judgment in favor of Mrs. Snow, the claimant of the half blood, and the claimants of the whole blood excepted and appealed.

L. P. McGehee for appellant.
E. W. Ewbank for appellee.

HOKE, J. In the case agreed, the family connection and blood relationship of the parties to this proceeding are given as follows:

"1. Thomas E. Skinner, formerly of Raleigh, N. C., married first, Ann Eliza Halsey, of which marriage there were children as follows:

"(a) Sarah Halsey Skinner, who intermarried with Samuel Snow, and who is a party to this proceeding, said Samuel Snow being dead; and

"(b) Thomas Skinner, who died without issue, and whose wife is now dead. There was no other issue from this marriage.

"2. The said Thomas E. Skinner married, second, Ann Stuart Ludlow, of which marriage there were children who survived infancy as follows:

"(a) Eliza Mary Skinner, who intermarried with George B. McGehee, and who is a party to this proceeding, the said George B. McGehee being now dead.

"(b) J. Ludlow Skinner, who intermarried with Octavia Winder. The said J. Ludlow Skinner is now dead, leaving issue, John Cox Winder Skinner only, who is a party to this controversy.

"(c) Charles Worth Skinner, who is now dead, and his duly qualified administrator, Joseph B. Cheshire, Jr., is party to this controversy. Said Charles Worth Skinner never married.

"No other children of this marriage survived infancy."

It further appeared that the estate, consisting of personal property to the amount of $44,000, less some valid payments made by the administrator, devolved upon Charles Worth Skinner, the intestate under a settlement of his grandfather, John R. Ludlow, by which the property was given to the mother, Ann Stuart Ludlow-Skinner for life, and then to her children, etc.

It seems to have been definitely settled in the English courts, at least as early as 1690, that there is no distinction in the rights of claimants of the half and the whole blood to share in the distribution of personal property. *Crook v. Watt,* 2d Vernon, 124. This decision, rendered on 11 February, 1690, was affirmed in the House of Lords at or near the beginning of the Easter Term following, and does not seem to have been afterwards questioned as the correct construction of the statute applicable to the subject. 2 Ventris, 317; 23 Eng. Rep., 689. The same position has prevailed with great uniformity in the American courts, unless affected by some change in the different State statutes on the subject. *Prescott v. Carr,* 29 N. H., 453, reported also in 61 Am. Dec., 652; *Anderson v. Bell,* 140 Indiana, 375, reported in 29 L. R. A., 541; *McKinley v. Mellon,* 8 Delaware, 277; *Deadrick et al. v. Armour,* 29 Tenn., 586; *Ector v. Grant,* 112 Ga., 557. The authoritative text-books, so far as examined, are in accord with the decisions. 2 Black's, 515; 2 Kent, 428; Williams on Personal Property, p. 362; 9 R. C. L., 32-33; 27 Am. and Eng. Enc., 2d ed., 315.

In the citation to Williams, *supra,* it is said: "In tracing the degrees of kindred in the distribution of the intestate's personal estate, no preference is given to males over females; nor to the paternal over the maternal line; nor to the whole over the half blood," etc. The degrees of kindred are reckoned according to the civil law.

In 9 R. C. L., *supra,* it is said: "The rule is nearly uniform that brother and sister of the half blood are included in the statutory provision for descent to brother and sister, unless a contrary intention appears, and the phrase 'of the blood' is held to include half blood, and the term 'next of kin' is construed to include the half blood, especially where the degrees of kinship are reckoned according to the civil law, by which they are equally next of kin."

The precise question as to personal property does not seem to have been presented in this State, but our statute of distribution in the terms appertaining to the question is the same or substantially similar to the English law, which had been construed as above stated. It contains throughout nothing which affects any change in reference to this especial subject, and, on authority, we must approve the ruling of his Honor in awarding her proportionate and equal share to the claimant of the half blood.

There is no error, and the judgment of the Superior Court is
Affirmed.

J. A. PRITCHARD ET AL v. D. E. WILLIAMS.

(Filed 19 November, 1919.)

1. **Appeal and Error—Opinion of Court—Issues—Damages.**
The opinion of court in this case, granting a new trial, suggests that the issue might be amended to read, "To what amount is the value of plaintiff's premises increased by such permanent improvement?"

2. **Damages—Permanent Improvements.**
Where on the issue for damages the question of permanent improvements enters, such question is a mixed one of law and fact, depending largely upon the circumstances of each case, and the measure of compensa-

tion is the actual enhancement in the value of the lands by reason of the improvements made thereon.

3. Appeal and Error—Anticipating Error.

Upon granting a new trial on appeal, the Supreme Court will not ordinarily pass upon matters not presented therein, in anticipation of the law as the Superior Court judge may thereafter rule it to be.

ALLEN, J., dissenting.

PETITION to rehear the opinion in this case, 176 N. C., 108.

D. H. Tillett and Meekins & McMullan for plaintiffs.

Aydlett, Simpson & Sawyer, R. C. Dozier and Ehringhaus & Small for defendant.

CLARK, C. J. This is a petition to rehear the well considered opinion, 176 N. C., 108, delivered by *Brown, J.,* for a unanimous Court, at Fall Term, 1918.

After the fullest consideration, we think that our former opinion should be adhered to in every respect, and for the reasons therein so convincingly set forth. Issue three suggested in the *addenda* to that opinion, "What is the value of such permanent improvements?" we think might be amended in accordance with the provisions of Rev., 655, to read, "To what amount is the value of the premises increased by such permanent improvements?" though doubtless the trial judge would, without this suggestion, have instructed the jury that such was the meaning of the issue suggested.

Under the provisions of Rev., 494, the plaintiff filed in this cause a bill of particulars as to the permanent improvements for which he sought compensation. We do not think that in this case, in which we have reversed the nonsuit below, we need pass upon what are and are not permanent improvements. What are permanent improvements is a mixed question of law and fact, depending largely upon the circumstances of each case, and the instructions of the court, if excepted to, will come up on appeal. Some improvements, which might be deemed permanent in certain surroundings, would be of no value in other circumstances, because unsuitable for the ordinary use of the property.

The measure of compensation is nowhere better discussed than in 14 R. C. L., p. 25, sec. 15, in the course of which it is said: "The measure of compensation is not the original cost of the improvements, but the actual enhancement in the value of the land by reason of the improvements made thereon."

The question raised in the plaintiff's brief as to the restriction or enlargement of damages and rental values (Rev., 654) by reason of the life estate may or may not arise on the trial. It is not, and cannot be, presented by this appeal, and it would be supererogation to instruct the judge below upon a matter as to which his ruling may be satisfactory on the trial, if upon the evidence a ruling should be called for.

Petition dismissed.

ALLEN, J., dissenting: When the former appeal in this action was before the Court we said, "The verdict, when considered in connection with the charge, also establishes that neither the defendant nor any one under whom he claims is a purchaser for value." *Pritchard v. Williams,* 175 N. C., 321.

We must then deal with the defendant as a volunteer and not as a purchaser.

The defendant admitted, while a witness in his own behalf, that he was told before he bought he would buy a lawsuit, and he said he made no further inquiry.

I understand the law to be as stated in *Ijames v. Gaither,* 93 N. C., 361, and many other cases, that "whatever is sufficient to put a party on inquiry, he is presumed to have notice of every fact and circumstance which a proper inquiry would enable him to find out. 1 Story's Jurisp., par. 400; *Blackwood v. Jones,* 4 Jones Eq., 54."

The party who told the defendant he would buy a lawsuit is the one by whom the trust was established, and the defendant, on his own admission, could have learned of the rights of the plaintiffs by a simple inquiry, and, if so, the law says he took his deed with notice of the trust.

"This doctrine of betterments, and the principle upon which it was originally made to rest, is very well stated by *Ashe, J.,* in the case of *Wharton v. Moore,* 84 N. C., 482, as follows: 'This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and, while it has been adopted in many of the States, it is not recognized in others. But it may now be considered as an established principle of equity that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person who has made improvements on land without notice of a superior title, believing himself to be the absolute owner, aid will be given him only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity.' Here it will be noted that the claimant must be an innocent person, and in any correct statement of the principle will be found this or some equivalent requirement indicating that the occupant made the expenditures in good faith—that is, that he believed, and had reasonable ground to believe, at the time they were made, that he was the true owner." *Alston v. Connell,* 145 N. C., 4.

It also appears that the defendant was the owner of a life estate at the time he made the improvements, and, "It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements, nor can a charge upon the lands or the inheritance be made for such improvements, it being generally held that a life tenant does not come within the purview of the betterment or occupying claimant's acts. The reasons for this rule are that the life tenant should not be permitted to consume the interest of the remainderman by making improvements that the remainderman cannot pay for, or that he does not desire, and, also, that improvements are made for the immediate benefit of the life estate, and usually without reference to the wishes of the remainderman. Mere knowledge on the part of the remainderman that improvements are being made and passive acquiescence therein are not sufficient to charge him with the cost thereof." 17 R. C. L., 635.

Smith, C. J., said, in *Merritt v. Scott,* 81 N. C., 387: "We think it clear that improvements of any kind put upon land by a life tenant during his occupancy, constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state, without deduction for its increased value by reason of good management, or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority."

This rule has only been relaxed in favor of a purchaser who made the improvements in good faith under a deed purporting to convey the fee, which he accepted under the advice of learned counsel (*Faison v. Kelly,* 149 N. C., 285), and not in behalf of one, who is not a purchaser for value, and who took his deed with notice of the trust.

W. T. SHANNONHOUSE, EXECUTOR, ET AL., v. J. FLEETWOOD.

(Filed 19 November, 1919.)

Wills—Devise—Executors and Administrators—Trusts—Powers—Consent of Widow—Deeds and Conveyances.

By the related provisions of a will the testator gave his estate to his wife for life, appointed an executor, giving him general management thereof, imposed upon him the duty to consult with the widow and secure her written consent "regarding all matters of sale and investment," and that within the discretion of the executor, any property that the testator may own at the time of his death, "be sold, and the proceeds of same reinvested in good and substantial stocks, bonds, or real estate." *Held*, the discretion of the executor was restricted by the terms of the will only by the requirement for the consent of the widow in writing, and a sale of the testator's lands accordingly made, conveyed a good title.

CONTROVERSY without action, submitted to *Bond, J.*, at August Term, 1919, of PERQUIMANS.

The plaintiffs contracted to sell to the defendant a certain tract of land at a certain price. The defendant is willing to take the land and pay the money, but avers that the title is not good. The court held that the title was not good, and adjudged that the defendant be not required to pay the purchase money. Plaintiffs appealed.

William T. Shannonhouse for plaintiffs.
Charles Whedbee for defendant.

BROWN, J. The title to the land depends upon the construction of the will of H. T. Shannonhouse, deceased. It is admitted that if the executor, William T. Shannonhouse, acting in connection with the wife of the testator, has power to sell the land under the terms of the will, then the proffered title is good, and the defendant may justly be required to pay the purchase money. The will contains the following provisions:

"I hereby appoint my brother, William T. Shannonhouse, to be and act as my sole executor, and that he shall furnish good and sufficient bond.

"I hereby impose upon my executor, as part of his duties hereunder, that in all matters he shall consult and secure the consent in writing of my wife, Annie H. Shannonhouse, regarding all matters of purchase or sale and reinvestments.

"I hereby desire and will to my wife, Annie H. Shannonhouse, all of my life insurance, to be paid her immediately upon settlement of same with the insurance companies, said sum to belong to her in full and in fee.

"No. 2. I will and devise to my wife, Annie H. Shannonhouse, during her lifetime all of my properties of all and every kind.

"I hereby appoint and authorize my brother, William T. Shannonhouse, to act as manager, and have full power of handling all property for my wife, Annie H. Shannonhouse, subject to paragraph three on sheet No. 1.

"It is my will and desire that any property that I may own at the time of my death, and any of same should be found to be not profitable or remunerative, that same shall, in the discretion of my brother, William T. Shannonhouse, subject to paragraph three of sheet No. 1, be sold, and the proceeds of same reinvested in good and substantial stocks, bonds, or real estate.

"I will and devise that all revenue from my property of all kinds (No. 3 sheet) be paid to my wife, Annie H. Shannonhouse."

It is stated in the case that in the opinion of W. T. Shannonhouse, executor, concurred in by Annie H. Shannonhouse, by her consent in writing, the said farms are not profitable or remunerative, and it would be for the best interest of all that a sale be made of all the farms and proceeds reinvested in good substantial stocks, bonds, or real estate.

We are of opinion that, under the will, the power of sale is conferred upon the executor subject to the approval of the widow. A certain discretion is vested in the executor, subject to such approval, to determine whether or not any of the property of the testator proves to be unprofitable and unremunerative. In such case, the executor is charged with the duty of selling the same and reinvesting the proceeds in "good and substantial stocks, bonds, or real estate." The power of the executor is restricted always, throughout the entire will, by requiring him to have the approval of the widow. She seems to be the first object of the testator's care, and is given practically all the revenues of the estate. It is declared by the executor and the widow that the farms are not profitable or remunerative, and that it would be for the best interest of all concerned that a sale be made of all the farms and the proceeds reinvested according to the terms of the will.

We think this provision of the will speaks for itself, and is couched in plain and simple terms. It is not unreasonable. On the contrary, it may be a wise provision, by which the income of the widow may be increased.

We are of opinion that the proffered title is good, and that the defendant should be required to accept the deed and pay the purchase money.

Reversed.

DIRECTOR-GENERAL OF RAILROADS AND SEABOARD AIR LINE RAILWAY v. COMMISSIONERS OF BLADEN COUNTY.

(Filed 19 November, 1919.)

Taxation—Limitations—Ordinary Expenses—Constitutional Law—Counties and Towns—Municipal Corporations—Statutes—Protest—Actions.

An act which attempts to authorize a county to levy a tax in excess of the 66⅔ cents on the hundred-dollar valuation of property, State Constitution, Art. V, sec. 1, for "current and necessary expenses," is for the ordinary expenses of the county and is void as to the excess; and not being valid under section 6 of the same article relating to taxation for special purposes, a taxpayer, having paid the tax under protest and conformed to the provisions of the statutes, may recover it in his action. *R. R. v. Cherokee County*, 177 N. C., 86, cited and applied.

HOKE, J., concurs in result; CLARK, C. J., dissenting.

APPEAL by defendant from *Calvert, J.,* out of term by consent, upon case agreed, 8 July, 1919, from BLADEN.

This is an action to recover the amount of a tax levy of five cents paid under protest.

The parties have agreed upon the following facts:

"1. That in the year 1918 the commissioners of Bladen County levied taxes for ordinary county purposes, which, with the State taxes, amounted to sixty-six and two-thirds cents on property of the value of $100, and in addition thereto levied a special tax of fifteen cents for schools, and in addition thereto levied a tax of five cents, which last tax is the tax in controversy in this action.

"2. That the taxes so levied in 1918, and referred to in the last preceding paragraph, are itemized as follows:

State tax for general purposes	23⅔
State tax for pensions	4
State tax for schools	20
Total State tax levied under sec. 3, ch. 231, Public Acts of 1917, being the 1917 Revenue Act	47⅔
Add general county tax	19
	66⅔
Add special school tax levied under sec. 8 of ch. 33, Public Acts of 1913	15
	81⅔
Add county tax levied under chapter 101, Public-Local Acts of 1917, which is the tax involved in this action	5
Making total tax levied in 1918 on $100 valuation	86⅔

"3. That none of the aforesaid taxes levied in 1918 were submitted to a vote of the people."

The plaintiffs have paid all of the taxes levied, and they make no contest as to any except the tax of five cents, levied in excess of 66⅔ cents on property of the value of $100 to meet current and necessary expenses of the county.

The statute under which the defendant claims authority to levy the tax is chapter 101, Public-Local Laws 1917, the material part of which is as follows:

"Section 1. That the board of commissioners of Bladen County are hereby directed to examine, on or before the first Monday in June of each year, the tax abstracts for the current year, and if, upon such examination, it shall appear that the taxes which the board are authorized to levy, after deducting from the 81⅔ cents on the $100 worth of property, the taxes levied by the State for general purposes, for pensions and for schools, and the fifteen cents special school tax, will not be sufficient to meet the current and necessary expenses of the county for the current year, then the said board of commissioners shall be, and are hereby, authorized, empowered, and directed to levy and collect, in addition to said 81⅔ cents, a sufficient amount of taxes on all the tangible property and polls within said county of Bladen to meet the current and necessary expenses of the county, said additional tax not to exceed ten cents on the $100 valuation of property, and thirty cents on the poll, and in levying and collecting such tax the constitutional equation between property and poll shall be observed."

Judgment was rendered in favor of the plaintiffs, and defendant excepted and appealed.

McIntyre, Lawrence & Proctor for plaintiffs.
E. F. McCulloch, Jr., for defendant.

ALLEN, J. The facts in *R. R. v. Cherokee,* 177 N. C., 86, are almost identical with those in the record now before us, and the principles therein announced are decisive of the present appeal.

In that case the county of Cherokee levied a tax of 2⅔ cents in excess of 66⅔ cents on property of the value of $100, for the purpose of taking up a note in bank and paying other current expenses, acting under a statute which authorized the commissioners to levy a special tax in excess of the constitutional limitation not to exceed five cents on property to provide for any deficiency in the necessary expenses and revenue of the county, and it was held that the plaintiff, who had paid under protest, was entitled to recover it.

We then said, after quoting Art. V, sec. 1 of the Constitution: "This section commands two things:

"'1. That the poll tax shall always be equal to that on $300 valuation of property. This has been called the equation of taxation.

"'2. That the State and county poll tax shall not exceed $2. This fixes the limit of taxation on polls, and consequently on property.

"'These two directions are equally definite and positive; they are in no wise inconsistent with each other; it is impossible that one has any more favor or sanctity than the other merely because it comes earlier or later in the sentence; they must be equally binding on the Legislature.' *Rodman, J.,* in *Winslow v. Weith,* 66 N. C., 432.

" 'It is well settled that, for the ordinary expenses of government, both State and county, the first section of Art. V of the Constitution places the limit of taxation and preserves the equation between the capitation and the property tax—the capitation tax never to exceed $2, and the tax upon property valued at $300, to be confined within the same limit.' *Board of Education v. Comrs.,* 111 N. C., 580.

" 'The taxes which the commissioners are empowered to levy have their limitations in the Constitution, and these cannot be exceeded "except for a special purpose and with the special approval of the General Assembly." Const., Art. V, secs. 1 and 6. The construction of these clauses has been fixed by a series of decisions, from one of which (*French v. Comrs.,* 74 N. C., 692) we extract the emphatic declaration of *Bynum, J.:* "It admits of no dispute now that taxation for State and county purposes combined cannot exceed the constitutional limitation for their necessary expenses and *new debts.*" *Trull v. Comrs.,* 72 N. C., 388; *Clifton v. Wynne,* 80 N. C., 145; *Mauney v. Comrs.,* 71 N. C., 486; *Cromartie v. Comrs.,* 87 N. C., 139."

And again, after quoting Art. V, sec. 6: "These two sections must be considered and read together with the purpose in view of giving effect to both, and a construction must be avoided which will make one destructive of the other, which would be the result if the commissioners could exceed the constitutional limitation under authority of section 6 for general purposes, and under general laws, because under such a construction the General Assembly could levy a State tax up to the limitation under section 1, and then pass a general law under section 6, allowing the counties to levy the same tax for county expenses."

The *Cherokee case* has attracted much attention, because it has stood in the way of some improvements that were needed, and of others very much desired, but it declares no new principle, and, on the contrary, simply adheres to the uniform and consistent construction of the Constitution since *R. R. v. Holden,* 63 N. C., 410, and was affirmed at the last term by the unanimous opinion of the Court in *Parvin v. Comrs.,* 177 N. C., 509, in which the Court says, after referring to the *Cherokee case:* "In that case the tax was intended to provide for past deficits in the revenues for ordinary and necessary county expenses, and fell directly within Art. V, sec. 1 of the Constitution, prescribing the limitation and equation of taxation, and not within sec. 6 of that article."

This Court said, in *French v. Comrs.,* 74 N. C., 696: "It admits of no dispute now that taxation for State and county purposes combined cannot exceed the constitutional limitation for their necessary expenses and new debts. . . . If what are often miscalled the necessary expenses of a county exceed the limitation prescribed by law, the necessity cannot justify the violation of the Constitution. In such cases two remedies are open to the county. One is to apply to the Legislature, if the tax is required for a special purpose. The Constitution, Art. V, sec. 6, empowers the Legislature in such cases to give a special approval for an increased levy. The other and better way, however, is to reduce the expenditure. . . . We hold that the State tax of thirty-eight cents, and the county tax of twenty-eight and two-thirds on the hundred dollars of valuation exceeds the constitutional limitation of taxation for current expenses."

In *Cromartie v. Comrs.,* 87 N. C., 134: "The taxes which the commissioners are empowered to levy have their limitations in the Constitution, and these cannot be exceeded except for a special purpose and with the special approval of the General Assembly. Const., Art. V, secs. 1 and 6. The construction of these clauses has been fixed by a series of decisions."

In *Board of Education v. Comrs.,* 107 N. C., 110: "It is settled by many decisions of this Court that the equation and limitation of taxation established by the Constitution, Art. V, sec. 1, prohibits and prevents the levy of a greater capitation tax than $2 on each taxable poll, and a tax for the equal amount on property valued at $300 in cash to raise revenue for the ordinary purposes of the State and county governments. This is equal to a tax levy of 66⅔ cents on property valued at $100 in cash. For such purpose the whole tax levied cannot exceed the sums mentioned. *R. R. v. Holding,* 63 N. C., 410; *Mauney v. Comrs.,* 71 N. C., 486; *Trull v. Comrs.,* 72 N. C., 388; *French v. Comrs.,* 74 N. C., 692; *Griffin v. Comrs.,* 74 N. C., 701; *Clifton v. Wynne,* 80 N. C., 145."

In *Williams v. Comrs.,* 119 N. C., 521: "The general power of the Legislature to levy taxes is restricted by the Constitution to 66⅔ cents on $100 valuation of property. Art. V, sec. 1. And Art. V, sec. 6, restricts the power of the county to double the amount levied for State purposes. But both these levies, for State and county together, cannot exceed the constitutional limitation of 66⅔ cents. *R. R. v. Holden,* 63 N. C., 410."

In *Moose v. Comrs.,* 172 N. C., 427: "It is well settled that, for the ordinary expenses of government, both State and county, the first section of Art. V of the Constitution places the limit of taxation and preserves the equation between the capitation and the property tax—the capitation tax never to exceed $2, and the tax upon property valued at $300 to be confined within the same limit."

And in *Bennett v. Comrs.,* 173 N. C., 625: "The Constitution, Art. V, sec. 1, provides in effect that for ordinary purposes the State and county tax combined shall in no case exceed the sum of $2 on the poll, and 66⅔ cents on the $100 valuation of property. So far as we are aware, and as to debts and obligations incurred since the provision was established, no departure from this limitation on the amount of taxation has been approved except when and to the extent required to maintain a four-months school, as enjoined by Art. IX, sec. 3 (*Collie v. Comrs.*, 145 N. C., 170), and except when the tax is levied for a special purpose and with the special approval of the General Assembly. *Moose v. Comrs.*, 172 N. C., 419; *R. R. v. Comrs.*, 148 N. C., 220."

Another remedy than the two suggested in *French v. Comrs.* is to amend the Constitution if the limitation on taxation does not meet the present needs of the State, but this must be done in the way pointed out in the Constitution and not by the courts.

These authorities establish beyond controversy that the State and county taxes combined cannot exceed 66⅔ cents on property of the value of $100 for ordinary expenses, and it would seem to require no discussion to show that "current and necessary expenses," for which the tax levied by the defendant proposes to provide, are ordinary expenses.

There may be evils attending the exercise of jurisdiction to declare an act of the General Assembly unconstitutional, but they are not comparable to those following the declaration that a constitutional provision is of no effect by judicial decision.

The first is necessary to make the acts of legislators, who are but agents of the people, conform to the wishes of their principles as expressed in the Constitution, while the other would enable the courts to destroy our system of government, which is one of law and order under a written Constitution, and as we are confronted with the necessity of making a choice between the two, we stand by the Constitution.

If the General Assembly can authorize the levy of a tax in excess of the constitutional limitation for the ordinary expenses of a county, and the courts should so declare, Art. V, sec. 1 of the Constitution, which was intended to protect the people against excessive taxation, would be a "dead letter" and of no effect.

Affirmed.

Hoke, J., concurs in result.

Clark, C. J., dissenting: The General Assembly of 1917, ch. 101, Public-Local Laws, authorized the "commissioners of Bladen County to levy and collect a sufficient tax to maintain six-months school in said county, and not to exceed 10 cents, to meet the current expenses of the county." On 8 July, 1918, the commissioners duly made the tax levy for the ensuing year: "Pursuant to chapter 101, Public-Local Laws 1917, the board of commissioners of Bladen County, at its regular monthly meeting on the first Monday in June, examined the tax abstracts and it having appeared that the taxes which the board was authorized to levy, after deducting 81⅔ cents on the $100 worth of property for general State purposes, pensions, and schools, including 15 cents special school tax, there will not be sufficient funds to meet the current and necessary expenses of the county, a special tax of 5 cents on the $100 worth of property, and 15 cents on every poll within the county is levied."

The Constitution, Art. V, sec. 1, provides that, "The General Assembly shall levy a capitation tax, which 'shall be equal to the tax on property valued at $300 in cash.' " If this was the absolute limit the property tax, State and county, could under no circumstances ever exceed 66⅔ cents on the $100. But the increase in the expenses of government was foreseen, and Art. V, sec. 6, reads as follows: "The taxes levied by the commissioners of the several counties for *county purposes* . . . shall never exceed the *double of the State tax except* for a *special purpose,* and *with the special approval* of the General Assembly." Without this last provision the county governments throughout the State from time to time would have ceased operations, for the margin between the taxation for State purposes and 66⅔ cents would hardly permit a single county in the State, at the present time, to pay its current expenses, with the result that the necessary county institutions would cease to exist, the jurors and the expenses of the courts would go unpaid, and all other necessary expenses, to the extent that county paper would sell at a heavy discount. Yet these would have to be paid at some future day, at a vast loss, because a large quantity of depreciated county scrip would necessarily be issued to carry on the county government.

For this reason, the Constitution, Art. V, sec. 6, permits the commissioners of the county to levy taxes in excess of the 66⅔ cents "for a special purpose and with the special approval of the General Assembly."

This has been done for years and for nearly every county in North Carolina, as it has been done for Bladen County by the above chapter 101, Public-Local Laws 1917. For "other than necessary expenses" no county can levy a tax without the approval of a popular vote. Const., Art. VII, sec. 7.

These county expenses must be paid some time, and as the county certainly cannot pay its necessary current expenses, with the steadily recurring deficits, some such act as this will have to be passed by the General Assembly in some future year, and if such act will be valid then, why is not this act of 1917 valid? For what reason must the deficit be allowed to grow until some future Legislature shall pass an act, exactly like the one now in question, to permit the payment of the necessary expense of the county? Necessary county expenses is the sole special purpose for which the General Assembly can give its approval. For any other purpose a vote of the people is necessary.

This act was passed for the special purpose of meeting this deficit and paying the current expenses of the county, which is as much a special purpose as to pay a note incurred for past indebtedness or to build a bridge. *Martin County v. Bank,* at this term, or to make public roads, *Hargrave v. Comrs.,* 168 N. C., 626, and Surry County and Wilkes County cases at this term, or for public schools, *Davis v. Lenoir,* at this term. It is the only method which the commissioners have of raising funds to meet the necessary expenses of the county. It is found as a fact that it was necessary to levy this tax to meet the necessary expenses of the county.

The deficit was caused by matters over which the commissioners had no control. If the General Assembly, by this act, had power to authorize the necessary special tax of 15 cents for the schools, it has the same power to authorize the levy of a special tax of 5 cents to pay the deficit in the county revenue as a special purpose. This act specified and authorized the levy of the 15 cents for the schools and the 5 cents for the other necessary county expenses.

Cui bono permit the deficit for necessary expenses to run up, thus requiring the issue of county scrip at a heavy depreciation, and then permit the aggravated deficit to be collected by exactly such act as this by styling that a special purpose when the General Assembly has authorized this levy of 5 cents for current expenses as a special purpose? John Randolph said good finance and honesty required government to "Pay as you go."

The Const., Art. V, sec. 6, allowing the county commissioners "for county purposes to levy in excess of double the State tax by the special approval of the General Assembly" is an absolute nullity, if such permission does not allow the county and State tax combined to exceed 66⅔ cents, for it has been many a year since the State tax was less than 22⅓ cents. For years every tax for county purposes authorized by the special approval of the General Assembly, without a vote of the people, has necessarily been to exceed the 66⅔ cents limitation. The summary as to the constitutional provisions in regard to taxation is thus laid down in *Herring v. Dixon,* 122 N. C., 420.

1. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

2. For necessary expenses, the county commissioners may exceed the constitutional limitation, by special legislative authority, without a vote of the people. Const., Art. V, sec. 6.

3. For other purposes than necessary expenses, a tax cannot be levied either within, or in excess of, the constitutional limitation except by vote of the people under special legislative authority. Const., Art. VII, sec. 7.

The above summary and analysis first laid down in *Herring v. Dixon,* 122 N. C., 420, has been quoted verbatim and incorporated in *Tate v. Comrs., ib.,* 815; *Smathers v. Comrs.,* 125 N. C., 488; *Cotton Mills v. Waxhaw,* 130 N. C., 298; *R. R. v. Comrs.,* 148 N. C., 251, and *Pritchard v. Comrs.,* 160 N. C., 477.

In Connor and Cheshire on Const., p. 281, it is said: "The equation and limitation placed upon taxation by Art. V, sec. 1, has no application to taxes levied hereunder for a special purpose, when levied with the special approval of the General Assembly," citing *Board of Education v. Comrs.,* 137 N. C., 310; *Jones v. Comrs.,* 107 N. C., 248; *Street v. Comrs.,* 70 N. C., 644; *R. R. v. Holden,* 63 N. C., 410; *R. R. v. Comrs.,* 148 N. C., 220. This has always been the necessary, and, indeed, the only resource when a county has gotten in debt for necessary expenses. There is no other way for the county to redeem its credit. This deficit was for the necessary expenses of the county, which not being able to levy over 19 cents by reason of the State tax of 47⅔ cents could not pay the necessary expenses of the county unless allowed by the Legislature under Art. V, sec. 6, to exceed 66⅔ cents limitation.

The tax here in question is authorized for a special purpose "to provide for any deficiency in the necessary expenses and revenue of said respective counties," and received the special approval of the General Assembly, chapter 101, Public-Local Laws 1917. This levy, therefore, is exactly within the constitutional authority of the General Assembly. Art. V, sec. 6.

In *Guire v. Comrs.,* 177 N. C., 518, *Allen, J.,* quoted from the above analysis in *Pritchard v. Comrs.,* and said: "The county may contract a debt and *exceed the limitation on taxation for necessary expenses with the approval of the General Assembly,* with or without a vote of the people as the General Assembly may determine," and *Walker, J.,* in *Parvin v. Comrs.,* 177 N. C., 508, said that the General Assembly may authorize the county to exceed the constitutional limit upon taxation to pay the interest on, or to create a sinking fund for, bonds issued for public roads, with the approval of the Legislature, without a vote of the people, "this being a necessary county expense." Both these decisions were at the succeeding term after the *Cherokee case,* and necessarily overruled it.

If the special approval of the General Assembly is sufficient to allow the county (as held in the *Parvin case*) to exceed 66⅔ cents to pay interest on past indebtedness, or as in the *Martin County v. Bank,* at this term, to build a bridge, and in the *Lenoir County case* for schools, and in the *Surry County* and *Wilkes County cases*, also at this term, to provide for public roads, the Legislature could certainly authorize the county of Bladen in this case to levy 5 cents in excess of such limitation "to provide for a deficiency in necessary county revenue and expenses."

Any limitation in Art. V, sec. 1, whether it is 66⅔ cents, or not to exceed "double the State tax," is subject to the permission of the General Assembly, whenever that body shall adjudge that it is necessary for the county to exceed that limit "for necessary county purposes," else Art. V, sec. 6, is an absurdity and a nullity—without any meaning whatever.

The result of holding invalid the act of the Legislature, which authorizes the levy of this 5 cents per $100 for the special purposes of meeting necessary county current expenses, will be the return to this railroad company of $533.04, and the court costs, which will be added to the deficit while other taxpayers have paid their *pro rata.* Next year this sum will be added to the burdens of all the other taxpayers who have had no return made to them of the taxes they have paid, and the railroad company, probably the largest property owner in the county, will thus obtain from year to year a special exemption of 5 cents per hundred on all its property, which burden will be added to the taxes ultimately paid by all the taxpayers in taking up the deficit.

It is true that the same ruling, as in this case, was made in *R. R. v. Cherokee,* 177 N. C., 87 (in which case, also, I dissented), with exactly the same result that the Southern Railway Company, with property in the county assessed at $1,024,000, recovered $275, and a heavy bill of costs, which had to be defrayed by the other taxpayers of the county, thus increasing the deficit, which, piling up, must sometimes be paid by virtue of an exactly similar act, whenever the deficit shall be large enough to entitle it to be called by the courts "a special purpose." The General Assembly adjudged the levy to prevent a deficit in Cherokee and to prevent this deficit in Bladen, "a special purpose." It is certainly as much a special purpose for the General Assembly to authorize *a levy for necessary county expenses to prevent a deficit* as later to authorize a levy *to pay off a deficit* largely aggravated by the *nonpayment of depreciated county paper.*

There is no other means by which the county can pay its current expenses except by the levy of taxation, and if it cannot exceed, as commonly held, 66⅔ cents, without the special approval of the General Assembly, the protection contemplated by the Constitution is that the Legislature will not give its approval unless it deems the special purpose a necessary one, and its decision as to that should be binding on the Court.

It may not be amiss to call attention to the fact, which *Mr. Justice Walker,* in *R. R. v. Cherokee,* 177 N. C., 93, has already done, that the Constitution, as written, does not limit State and county taxation to 66⅔ cents, though the Court has often so said. The language of the Constitution, Art. V, sec. 6, is as follows: "The taxes levied by the commissioners for county purposes . . . shall never exceed *the double the State tax,* except for a special purpose, and with the special approval of the General Assembly." *Walker, J.,* in *Collie v. Comrs.,* 145 N. C., at pages 181 and 182, has elaborated the same statement in a conclusive demonstration, and has repeated the same in *Moose v. Comrs.,* 172 N. C., 452.

As the State taxation authorized by the Laws of 1917, ch. 231, sec. 3, was 47⅔ cents on $100, the county would be authorized to levy, without requiring legislative permission, "not to exceed double that sum," *i. e.,* 95⅓ cents, besides the 15 cents for schools authorized by said chapter 101, Laws 1917, which is herein construed to be a special purpose. This would more than validate this 5 cents levy, to prevent a deficit for necessary county purposes.

For a long time it was held that schools were not a necessary purpose. Now, by reversal of former opinions, *Collie v. Comrs.,* 145 N. C., 170, they are held, and very properly a necessary expense, but it is a strange condition that those other expenses, which have always been held to be necessary, are now held to be of such inferior dignity that the Legislature cannot authorize the levy of a special tax to pay them.

It is true that the Constitution, Art. V, sec. 1, provides that the General Assembly may levy a capitation tax on the poll, which shall be equal to property valued at $300 in cash, and that the State and county capitation tax shall never exceed $2 on the head, but that is a limitation on the capitation tax which the Court has repeatedly held does not apply to the restriction of the property tax when it is necessary to exceed 66⅔ cents.

Besides, Art. V, sec. 1, provides that "the State and county capitation tax combined shall *never* exceed $2 on the head," and by sec. 2, "shall be applied to the purpose of education and the support of the poor."

In *R. R. v. Comrs.,* 148 N. C., 220, and *ib.,* 248, the Court held that this must be observed, and that the tax on the poll for State and county purposes "shall *never* exceed $2," and could be applied only to "education and the support of the poor," and added, p. 245: "This *question cannot again arise.*" Since then, the Court has overruled, by a vote of 3 to 2, in *Moose v. Comrs.,* 172 N. C., 419, those decisions. Why should the protection that the poll tax "shall *never* exceed $2" on each poll, and can only be applied to "education and the support of the poor," be treated as invalid, while the corporations and other large property holders in the State are entitled to have taxes refunded to them if in excess of 66⅔ cents (though there is no such limit in the Constitution), even when authorized by the special approval of the General Assembly for the purposes of defraying the necessary expenses of running the county government?

The ruling of the Court that "the State and county property tax combined should not exceed 66⅔ cents" is not in the Constitution, and began at a time when the State taxes did not exceed one-third of 66⅔ cents, and though the county levied double the State tax, the whole levy ordinarily would not exceed 66⅔ cents. When the State taxes for necessary purposes steadily mounted year by year to 22 cents, and then above, till now they reach 47⅔ cents, the always narrowing margin between such levy and 66⅔ cents did not leave enough to defray county expenses, and for that reason, at probably every session, under authority of Art. V, sec. 6, the Legislature has given its special approval to some counties, as in this, chapter 101, Public-Local Laws 1917, to exceed the 66⅔ cents by levying a special tax for the special purpose of defraying necessary county expenses. This has now become a standing necessity in probably nearly every county in the State.

The master said, "Ye make the Word of none effect through your tradition," Mark 7:13. The Constitution is the "Word" which abides. The word of the Constitution, as it is written, and abides with us, and can be read by all men, should govern, and not the decisions made by the courts, which can be and are changed by them at will, and should be changed always if in conflict with the Constitution.

In this case the legislative special approval of this levy of 5 cents for necessary county expenses is in exact accordance with the Constitution, and is in conflict, it seems, with no decision other than *R. R. v. Cherokee, supra.* In the later case of *Parvin v. Comrs.,* 177 N. C., *Walker, J.,* holds (at p. 511), and also *Allen, J.,* in *Guire v. Comrs.,* 177 N. C., at p. 518, that the limitation in Art. V, sec. 1, can be exceeded for necessary county purposes by permission of the Legislature under Art. V, sec. 6.

In the Constitution, as it is actually written, there is *no restriction on the property tax,* State and county, for necessary purposes to 66⅔ cents on the $100, and when, as is now the case, in probably every county this will not raise sufficient funds to carry on the county government, the strict prohibition that the poll tax, State and county combined, can *never* exceed $2, prevents the Legislature from going beyond that limit on the poll, but Art. V, sec. 6, empowers the counties to levy property taxes in excess of any limitation, with the approval of the General Assembly.

In *Jones v. Comrs.,* 107 N. C., 248, *Merrimon, C. J.,* says: "We are therefore of opinion that the equation and limitation of taxation established by the Constitution, Art. V, sec. 1, applies only to taxes levied for the ordinary purposes of the State and counties," and this language is quoted and approved by *Hoke, J.*, in *Perry v. Comrs.*, 148 N. C., 524, and has been always followed. It means when taxation is beyond $2 on $300, either by legislative approval for "necessary county purposes," or by a vote of the people, the *equation* (as well as the limitation) ceases as to the property tax for the poll tax, by the constitutional guarantee, "can *never* exceed $2 on the poll," and all taxation beyond the limitation in Art. V, sec. 1, must be on property and from other sources of taxation allowed by Constitution, Art. V, sec. 6.

And, finally, for what reason should the county of Bladen be required to borrow money to refund taxes levied and collected for "necessary county purposes" within "double the State tax" (if that is the limit), or by the special approval of the General Assembly, in excess of 66⅔ cents (if that is the constitutional limitation)? In either case, the county debt incurred for its necessary expenses must be paid some day by a tax levy.

If the refund is made only to those suing, the plaintiffs get an exemption not allowed to all others. If the refund is to all taxpayers alike, then there is the useless return of money to be again collected another year to pay the note for money borrowed and interest.

The true remedy is by an injunction against the levy and collection of taxes, if it can be shown that it is not required "for necessary county purposes," or exceeds the limitation without "the special approval of the General Assembly."

CHARLES B. KENDALL v. E. J. STAFFORD ET AL.

(Filed 19 November, 1919.)

1. **Statutes—Cities and Towns—Municipal Corporations—Commission Government—Salaries—Public Officials—Public Policy.**

In construing the general municipal act, Laws 1917, subch. 5, subsequently passed to the late amendments of our Constitution, and sec. 6 thereof, as follows: "The governing body of any city may, by ordinance, fix the salary of the mayor of such city, or heads of departments or other officers," and to discover its true meaning, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question.

2. **Same—Fix Salaries—Increase Salaries—Special Statutes—General Statutes—Constitution.**

Where by special legislation a commission form of government is provided for a city, creating three commissioners and dividing the authority between each of them and giving them united authority as a board, and the act itself has fixed the salary of each of them, who have accepted the duties before the late constitutional amendment, the provisions of the general municipal act, subch. 5, sec. 6, allowing the governing body of the city to "fix" the salary of the commissioners, does not permit them to change the general policy of the law, that public officers themselves may not pass upon matters in their official capacity in which they have a personal interest, and the board, created under the special act are without authority to increase the salaries of its members claiming such authority under the general law.

3. **Statutes—Cities and Towns—Municipal Corporations—Commission Government—Public Officers—Salaries—Increase—Vote of People.**

The general law permitting incorporated cities and towns to adopt a commission form of government, Laws 1917, subch. 5, by giving, under sec. 6, authority to the governing board by ordinance to "fix" the salary "of the mayor, . . . or heads of departments, or other officers," does not, by correct interpretation, permit the board, consisting of the mayor and two other commissioners, to increase their own salaries, fixed by the act, contrary to the settled policy of the State forbidding public officials to pass, as such, upon matters in which they are personally pecuniarily concerned, there being no express provision in the statute to that effect, the question for such increase being one for the people to vote upon.

CLARK, C. J., concurring.

APPEAL by plaintiff from *Bynum, J.*, at September Term, 1919, of GUILFORD.

This is a controversy without action, submitted upon the following facts:

1. That the city of Greensboro is a municipal corporation, and its charter is chapter 2 of the Private Acts of the General Assembly of 1911; that the defendants, E. J. Stafford, J. W. Donavant, and M. M. Boyles are the members of the board of commissioners of said city; that said Stafford is mayor and commissioner of accounts and finances, and said Donavant is treasurer of said city; that the plaintiff is a resident and taxpayer of said city of Greensboro.

2. That material parts of said charter are as follows:

"Sec. 4. That the corporate powers of the city of Greensboro shall be exercised as hereinafter provided by the board of commissioners and such other officers and agents as are hereinafter provided for, subject to such limitations as may be hereinafter imposed.

"Sec. 5. That the executive and administrative powers, authority, and duties in the city of Greensboro are distributed into and among the several departments, and the powers and duties to be performed are assigned to the appropriate departments and officers, all as herein set forth.

"Sec. 6. The board of commissioners shall consist of three members, one of whom shall be mayor, and all of whom shall be elected by vote of the people, as hereinafter provided. One of said commissioners shall be elected and known as the commissioner of public works; one of said commissioners shall be elected and known as the commissioner of public safety, and the mayor shall be known as the commissioner of public accounts and finances.

"Sec. 53. The mayor and commissioners shall have offices at the city hall. The compensation of the mayor shall be twenty-six hundred ($2,600) dollars per annum, and that of each commissioner twenty-four hundred ($2,400) dollars per annum, payable in equal monthly payments. Every other officer, agent, employee, and assistant of the city government shall receive such salary or compensation as the board of commissioners shall by ordinances provide, payable in equal monthly installments, unless the board shall order payments to be made at nonpayment intervals."

3. That on .... August, 1919, the board of commissioners of the city of Greensboro, composed of the defendants herein, adopted, by unanimous vote, an ordinance, which provides for an increase of $600 a year in the salary of each of said commissioners; and said E. J. Stafford, as mayor and commissioner of accounts and finances, and J. W. Donavant, as treasurer, intend to pay out of the public funds of said city the increased salary provided by said ordinance, unless they are restrained by this Court from doing so.

4. That plaintiff contends that the ordinance referred to is repugnant to the charter of said city, and the laws of North Carolina, and is therefore void; and that defendant should be restrained from the threatened misappropriations of public funds, and that the court should declare said ordinance void and of no effect.

And defendants contend that said ordinance is a valid exercise of the powers conferred upon them by chapter 136, subchapter 5, section 6, of the Public Laws 1917, which is as follows:

"The governing body of any city may, by ordinance, fix the salary of the mayor of such city or heads of departments of other officers."

Judgment was rendered in favor of the defendants, and the plaintiffs excepted and appealed.

N. L. Eure for plaintiff.
Charles A. Hines for defendants.

ALLEN, J. The city of Greensboro has adopted the commission form of government under a special act of the General Assembly (ch. 2, Private Laws 1911), and all the corporate powers of the city are vested in three commissioners, who are at present the defendants.

The charter of the city fixes the salary of each commissioner at a definite sum, and this has been increased $600 per annum by the unanimous vote of the defendants, each of the commissioners voting the increase for himself and for his associates.

This action of the commissioners is not assailed upon the ground of fraudulent or improper motives, nor is it claimed that the additional compensation is not deserved, but the plaintiffs, citizens and taxpayers, do question the power of the defendants to make the increase, and it is admitted that this power does not exist unless it is conferred by ch. 136, subch. 5, sec. 6, Laws 1917, which is as follows: "The governing body of any city may by ordinance fix the salary of the mayor of such city, or heads of departments or other officers."

The determination of the appeal depends therefore on the construction of the section of the municipal act quoted, and in the effort to discover its true meaning it is proper to consider the law as it existed at the time of its enactment, the public policy of the State as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act.

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one, and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended. For the purpose of determining the meaning, although not the validity, of a statute, recourse may be had to considerations of public policy, and to the established policy of Legislature as disclosed by a general course of legislation. . . . Where the proper construction of a statute is otherwise doubtful, arguments from the inconvenience, absurdity, injustice, or prejudice to the public interests, resulting from a proposed construction, may be considered." 36 Cyc., 110, *et seq.*

The law at the time the municipal act was adopted fixed the salaries of the defendants at definite sums, and in amounts sufficiently attractive to induce the defendants to accept the offices, and it was not necessary to deal with the salaries of the commissioners of Greensboro in order that the corporate powers might be exercised.

The public policy of the State, found in the statutes and judicial decisions, has been pronounced against permitting one to sit in judgment on his own cause, or to act on a matter affecting the public when he has a direct pecuniary interest, and this is a principle of the common law which has existed for hundreds of years.

"It is an ancient maxim, applicable in all cases, civil or criminal, where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort, that no man ought to be a judge in his own cause, a maxim which appeals with such force to one's sense of justice that it is said by *Lord Coke* to be a natural right so inflexible that an act of parliament seeking to subvert it would be declared void." 15 R. C. L., 527.

"Under the fundamental maxim that no one ought to be judge in his own cause, if we had no statute law upon the subject, no judge, whether probate or other, could take jurisdiction of any cause wherein he was a party, or otherwise had a pecuniary interest. This principle is of universal application as a rule of the common law, and subject thereto must be the exercise of all the powers of a judge. Broom's Legal Maxims, 118; 1 Hopkins Ch. Rep., 1; 2 Strange's Rep., 173.

"In accordance with this principle, in every grant of jurisdiction, it is always to be understood that the powers conferred are limited by the tacit exception that the judge is not to decide his own cause." *Gregory v. Ellis,* 82 N. C., 226.

"The common law forbade a man being the judge of his own cause, as 'if an act of Parliament give a man power to try all causes that arise within his manor or dale, yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.' 1 Blackstone, 91. . . . No one ought to be a judge in his own cause; and so inflexible, and so manifestly just, is this rule that *Lord Coke* has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void, in itself; for *jura naturae sunt immatubilia,* and they are *leges legum.'*

"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise.

"It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation, and when his own rights are in question, he has no authority to determine the cause." *White v. Connelly,* 105 N. C., 70.

In *Snipes v. Winston,* 126 N. C., 374, which is approved in *Davidson v. Guilford County,* 152 N. C., 437, the aldermen of Winston elected one of their members, who participated in the meeting, a street boss at a salary of $50 per month, and the Court declared the action of the board of aldermen void because of the pecuniary interest of one of its members, and said: "This principle cannot be questioned, and experience has shown its wisdom. Common reasoning declares this principle to be sound, and the public is entitled to have it strictly enforced against every public official."

The statute law is equally explicit, as it provides: "If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city, or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly, with another, he shall be guilty of a misdemeanor." Rev., sec. 3572.

Judges, jurors, clerks of courts, aldermen, and county commissioners were and are disqualified by direct pecuniary interest, and we come to the act of 1917, from which the defendants claim to derive their own salaries, knowing of this condition of the law, and that it was in the mind of the General Assembly when the municipal act was enacted, and fully conscious of the settled policy of the State, declared to be wise by experience, and that it should be strictly enforced in the interest of the public, and under which the action of the defendants would be void.

Was it the intention of the General Assembly to change the law, and to reverse the policy of the State, not only as related to Greensboro, but as to all municipal corporations in the State, because the act is general, and if it confers authority on the governing body of Greensboro to increase their own salaries, it has a like effect in other cities and towns?

The question ought not to be answered in the affirmative unless compelled to do so by the clear, positive mandate of the Legislature.

The language is, "The governing body of any city may, by ordinance, fix the salary of the mayor of such city or heads of departments or other officers."

The authority is to "fix" the salary, not to increase it, and while the first may include an increase, its ordinary meaning is to make permanent something that is unsettled, and the salaries of the defendants were already fixed and settled by the charter of the city.

It is also authority to "fix the salary of the mayor of such city or heads of departments or other officers," and not to increase their own salaries, and following the rule applicable to statutes conferring power on judges, laid down by Blackstone, and approved in *White v. Connelly, supra,* that, "If an act of Parliament gives a man power to try all causes that arise within his manor of dale; yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel," the act should not be held to cover an increase of their own salaries.

The defendants come within the letter of the statute, but not within its spirit, and a consideration of the whole statute leads to the conclusion that their authority over salaries relates to those of other officers, and not to their own.

"The words, phrases, and sentences of a statute are to be understood as used, not in any abstract sense, but with due regard to the context, and in that sense which best harmonizes with all other parts of the statute. In expounding one part of a statute, therefore, resort should be had to every other part, including even parts that are unconstitutional, or that have been repealed." 36 Cyc., 1131.

The statute (ch. 136, Laws 1917) enacted after the adoption of the constitutional amendment of 1916 for the purpose of providing by general law for the organization and government of cities and towns, is divided into subchapters, and these into sections.

The first subchapter provides, among other things: "The provisions of this act, so far as they are the same as those of existing general laws, are intended as a continuation of said laws, and not as new enactments, and so far as they give general powers to cities are supplementary to and additional to the special charters of cities, which have not such powers, unless inconsistent with or repugnant thereto, and a repetition of such powers if already possessed by cities by virtue of special charters."

The provision in the act giving authority to governing bodies to increase salaries, if held to apply to the city of Greensboro, would not only be repugnant to section 53 of its charter, which says "the compensation of the mayor shall be $2,600 per annum, and that of each commissioner $2,400 per annum," but it would destroy it.

Subchapter 2 provides for the incorporation of communities, and it is significant that after the board of municipal control has approved the petition, it is required to see that a mayor and commissioners are elected under chapter 73 of the Revisal, which has nothing in it relating to the commission or manager form of government, and deals only with the prevailing system of a mayor and aldermen or commissioners.

Subchapters from three to fifteen, inclusive, confer additional powers on municipal corporations, establish different departments, and prescribe the duties of different officials.

Subchapter 16 is divided into seven parts.

In Part 1 provision is made for elections to determine whether a particular plan of government shall be adopted, and in Parts 2, 3, 4, 5, and 6 the plans of government are set out, being (1) Government by mayor and city council elected at large; (2) Government by mayor and city council elected by districts and at large; (3) Commission form of government; (4) Government by mayor, city council, and manager; (5) Government combining same features in the other plans.

Part 7 says: "Any municipality may amend or repeal its charter or any part thereof, or adopt a new charter. The proposal to amend, repeal, or adopt may be initiated, (a) By the governing body of such municipality; (b) By any number of the qualified electors of such municipality, not less than twenty-five per centum of qualified electors entitled to vote at the next preceding regular municipal election in such municipality." The amendment proposed is then submitted to a vote of the people.

In all of these plans the salaries of the members of the governing bodies are fixed at specific sums or are graduated, dependent on population, and ample provision is made for amendment of the charter by a vote of the people, so that, if a salary named in a charter or in any plan of government becomes inadequate, by reason of changed conditions or otherwise, the question of an increase of salaries can be decided by the people instead of by those who would be benefited by the increase.

It is proper to take into consideration, in determining the true construction of the act, that the salaries of the defendants were already "fixed" in the charter of the city when the municipal act of 1917 was adopted; that the public policy of the State during its whole history and at the present has condemned the idea that one may sit in judgment on his own cause; that the public welfare demands that this principle shall be rigidly enforced in order that public officials may be free from temptation, and may have an eye single to the interest of the public; that the municipal act does not in express terms authorize an increase of salaries but only gives authority to fix salaries; that it does not refer to increasing the salaries of the members of the governing body, but only to the salaries of mayor, heads of departments, and other officials; that to hold the section upon which the defendants rely gives authority to increase their own salaries would be destructive of a part of the charter of the city; that under the municipal act the salaries may be increased by submitting the question to a vote of the people, and giving due weight to these matters, we are of opinion that the action of the defendants in voting an increase of their salaries is without authority of law and void

Reversed.

CLARK, C. J., concurs in the well considered opinion of *Allen, J.*, in all respects, and adds: It is true that formerly, in all the States, the Legislatures were allowed to fix their own compensation. This exception to sound principle was deemed unavoidable by reason of its being the legislative power, and therefore the only authority which could act It is a part of the history this and all other States that at each session of the State Legislature, owing to the differences among the members as to the proper rate of compensation a week, and often more, of the session was usually wasted in settling that matter. To avoid this the State Constitution, adopted in 1868, Art. II, sec. 28, provided that: "The members of the General Assembly should receive as compensation for their services the sum of $4 per day for a session not exceeding 60 days and should they remain longer in session they shall serve without compensation." Public opinion deemed it inexpedient, as well as an impropriety, that officials should fix their own pay. For the same reason a similar change was made in the Constitution of nearly all the othe

States, fixing the compensation of members of the Legislature. By reason of the increased cost of living, this compensation has now become inadequate. But to meet this, wherever a constitutional amendment has been made it has increased the rate of compensation, and not restored to the Legislature the former power of fixing the compensation of its own members.

It is true that owing to the difficulty of amending the Constitution of the United States, Congress has been left free to fix its own compensation, but this is generally done to take effect with the next Congress. On a memorable occasion, when Congress raised its own compensation and made it date back to the beginning of the session, the popular indignation at what was styled the "back-salary grab" retired most of those members and senators who voted for it to private life.

The State Constitution of 1868 also provided, Art. III, sec. 10, that no officer whose office was established either by the Constitution or created by law "shall be appointed or elected by the General Assembly." This was to prevent the somewhat similar temptation to elect members of their own body. This provision has been stricken out by a subsequent amendment, with the result that it has become not unusual for that body to choose its own members to positions. Especially is this true in the election of trustees of the University, and to other unsalaried positions, the acceptance of which is not subject to the criticism that those elected receive additional compensation, but because in violation of Art. XIV, sec. 7, which provides: "No person, who shall hold any office or *place of trust* or profit," either under the United States or any other State, or under this State, "shall hold or exercise any other office *or place of trust* or profit under the authority of this State, or be eligible to a seat in either House of the General Assembly," with the exception only of "officers in the militia, justices of the peace, and commissioners of charities, or commissioners for special purposes."

I concur in the opinion of the Court upon both grounds given, *i. e.,* (1) That the charter having specified the compensation of these officials, this is not repealed by the general statute, Laws 1917, ch. 136, subch. 5, sec. 6, which is intended to authorize the board of aldermen to fix the salaries of the mayor and other officials. (2) That it is contrary to sound principles that any official should have the power to fix his own compensation.

IDA B. GORDON v. STEHLI SILKS CORPORATION.

(Filed 19 November, 1919.)

Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Dangerous Appliances—Instructions—Contributory Negligence—Trials—Motions—Nonsuit.

In an action by an employee in a silk factory to recover damages for a personal injury alleged to have been caused by the negligence of the defendant in leaving one of its motors, attached to a machine, uncovered, so as to expose its revolving cogs, in which the plaintiff's dress caught and inflicted the injury complained of, there was evidence tending to show that the plaintiff, in the performance of her duty, was required to go along the aisles separating the machines and around the motors at the end thereof; that she was not told that the cover had been removed by the defendant from this particular motor, and was unaware of it, and in going for a companion at supper time, as was her custom, the exposed cogs caught her dress and inflicted the injury without fault on her part. *Held*, sufficient to take the case to the jury on the issue of defendant's negligence in not furnishing her with a safe place to work, and defendant's motion to nonsuit was properly denied, as also a prayer for instruction that the plaintiff could not recover on the ground that she should have avoided the injury by keeping away from that particular motor.

APPEAL by defendant from *Lane, J.*, at March Term, 1919, of GUILFORD.

This action is to recover damages for personal injuries caused by the negligence of the defendant, who had taken the hood off of a certain cogwheel in the factory where the plaintiff worked, leaving it exposed so that the plaintiff had her dress caught in the cogs, sustaining injuries. Verdict and judgment for plaintiff; defendant appealed.

John A. Barringer for plaintiff.
Justice & Broadhurst and King & Kimball for defendant.

CLARK, C. J. The plaintiff had been working in the defendant's factory for some five years, and it was her duty to go from one machine to the other and take out the bad bobbins. There were 16 spinning frames all set in rows parallel to each other, but separated by aisles. There were little motors in the aisles at the end of each spinning frame around which the plaintiff went to get the defective work and bring it to the redrawing machine. The motors were geared to the spinning machines, the gearing being covered. The cover which fitted over the gearing of this particular motor had been taken off for repairs, and the cogs were left unprotected. When the plaintiff started to supper at 11:30 at night she went down the aisle to ask another girl to go with her, as was her custom, the wind, through an open window, blew her dress as she was passing this unprotected cogwheel, and her dress was caught in the cogs and pulled off of her and she was drawn down so that the calf of her left leg was caught and seriously injured by the cogs. She testified that she did not know that the cover was off the motor.

Taking the evidence, as we must, in the light most favorable to the plaintiff, the motion to nonsuit was properly refused. It was the duty of the defendant to furnish a safe place for the plaintiff to work, and it was negligence to leave the cogwheel unprotected. It was not negligence barring recovery by the plaintiff for her to go the way she did, unless she had been warned of the uncovered cogwheel. The court properly refused the prayer to charge the jury that she could not recover because she might have avoided going near that particular motor with the open cogwheel.

An uncovered cogwheel is a danger, and it was negligence to leave it uncovered, even if temporarily, without notice. The jury, under proper instructions, have found that this negligence was the proximate cause of the injuries sustained by the plaintiff. *Hardy v. Lumber Co.,* 160 N. C., 113, and citations to that case in the Anno. Ed.

No error.

J. T. WATSON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 19 November, 1919.)

Telegraphs—Commerce—Interstate—Relays—Beyond the State—Bad Faith —Mental Anguish—State Decisions.

Where a telegraph company has one or several means of sending entirely within the State a message received at one point therein to another within its boundaries, the relaying of the message beyond the borders affords evidence that it was done in bad faith to change the intrastate character of the message, and disregard our own decisions as to the recovery of mental anguish alone, and a verdict of the jury that its transmission thus was in bad faith, and awarding damages, will be sustained.

WALKER, J., concurring; BROWN, J., dissenting, and ALLEN, J., concurring in the dissenting opinion.

APPEAL by defendant from *Lane, J.,* at February Term, 1919, of GUILFORD.

This action is to recover mental anguish for delay in delivery of the following message:

RED SPRINGS, N. C., 5:50 p. m., 31 October, 1917.

J. T. WATSON, Greensboro, N. C.

Go to Charlie McKnight at Vanstory Clothing Company. Get money. Come to Buie *via* Raleigh, mother dead. N. A. WATSON.

This message, filed at Red Springs, 5:50 p. m., 31 October, 1917, was received at Greensboro 5:57 p. m. on the same day. The mother of the plaintiff had died on the same day at 2:30 p. m. The telegram was not delivered till about noon, 1 November, in consequence of which the plaintiff was unable to get to Red Springs until the morning of 2 November.

Verdict and judgment in favor of plaintiff. Appeal by defendant.

Charles A. Hines and C. R. Wharton for plaintiff.
King & Kimball for defendant.

CLARK, C. J. The chief, if not the sole, question presented by the briefs, both of the plaintiff and defendant, and on which this case was tried, is whether this was an interstate message. It was sent from Red Springs, N. C., to Greensboro, N. C., *via* Bennettsville, S. C. It was in evidence that there were at least four shorter lines of telegraph owned by defendant from Red Springs to Greensboro, lying wholly in the State, and over which this message might have been sent, to wit, from Red Springs to Fayetteville, and thence to Greensboro; also from Red Springs to Maxton, and from Maxton to Hamlet, and thence either *via* Raleigh or *via* Charlotte to Greensboro; and also from Red Springs to Selma, thence to Greensboro. The cross-examination of the defendant's witness showed that telegrams from Red Springs to every point in North Carolina (except to two or three stations between Maxton and Fayetteville) are sent by it over a wire that runs through South Carolina, or are sent to Richmond, Va., and thence back into this State. The plaintiff contended that these facts furnished evidence from which the jury could find that this method was adopted for the purpose of evading liability under the laws of this State, and that such course of business was not established in good faith, and the jury so found.

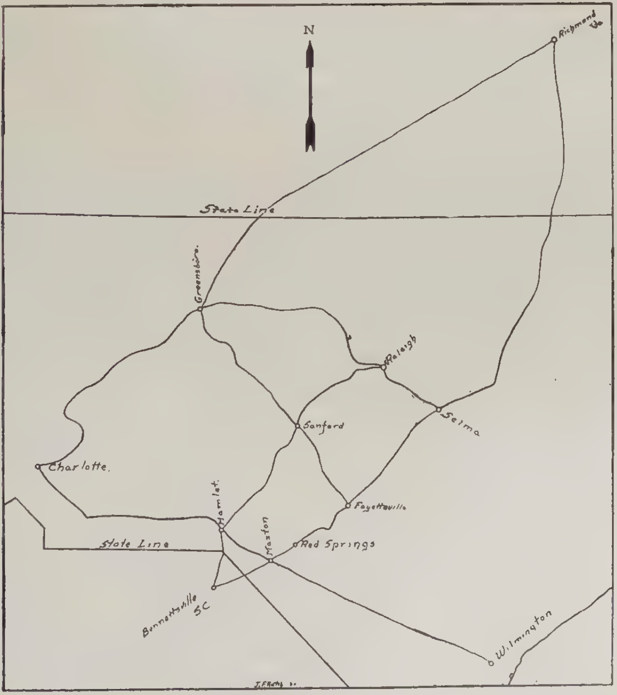
Exception 5 presents the following question: "1. Did his Honor err in charging the jury as follows: 'So, if the jury find from the evidence that even if this message came through the State of South Carolina, if it was not sent that way in good faith, over the usual necessary way in the transaction of its business, then you will not consider it an interstate message.' "

Exception 11: "Was there sufficient evidence to go to the jury that the defendant company acted in bad faith in routing the message out of the State as it did?"

The charge of the court was in line with the decision of this Court in *Bateman v. Tel. Co.*, 174 N. C., 97. The fact that by the peculiar methods adopted by the defendant, all messages from Red Springs to other points in this State (except to two or three points between Maxton and Fayetteville) are sent out of the State to some point in South Carolina, or to Richmond, Va., and thence back into this State, was certainly sufficient evidence to be submitted to the jury upon the question of good faith.

So generally has this method been adopted by the defendant that the Legislature of 1919, ch. 175, passed "An act to prohibit telegraph companies from converting intrastate messages into interstate messages," and provided therein that "Proof of the sending of any message from one point in this State to another point in this State shall be *prima facie* evidence that it is an intrastate message."

There are a few instances where, by reason of the configuration of the State boundary, or the location of the railroad or telegraph line, the transportation of freight and passengers, or the transmission of a telegram between two points in the same State, by the usual and most direct route, is through another State. In such case it is an *interstate* transaction. But the courts take judicial notice of State lines and the location of points within the State. Reference to the diagram shows that as a matter of law, as well as of fact, the transportation of freight or passengers or the transmission of telegrams between Red Springs and Greensboro is purely an *intrastate* matter.



If by the device of sending this message to Bennettsville, S. C., or to Richmond, Va., and thence to Greensboro, this could be made an interstate message it would follow that the State regulation by which 25 cents is the limit for a message of 10 words between two points in this State is entirely abrogated, and the telegraph company, by its methods of transacting business with a view of evading our law as to the measure of damages, has also annulled the right of the State to regulate telegraphic charges, and all other supervision of any kind whatever by the State over the telegraph company which does business in this State, under authority of our laws, and which is protected in its property, and as to the persons of its employees at the expense of the taxpayers of North Carolina.

The jury have found, upon adequate testimony, that this method was used to evade the State laws. But, independently of that, under the authority of *Speight v. Tel. Co., ante,* 146, the Court might well have held that, according to the United States Constitution and geography, as a matter of law, the transmission of a telegram between Red Springs and Greensboro was an *intrastate* transaction.

It being in evidence from the defendant's witnesses that there are at least four other shorter routes over which the defendant could have sent this message from Red Springs to Greensboro without sending it to a point in South Carolina, or to Richmond, Va., and thence back into the State, the judge might have instructed the jury, under the authority of *Speight v. Tel. Co., supra,* that irrespective of the question of good faith, this being a message between two points in this State, was an intrastate message, and governed by our laws, both as to charges for transmission and the measure of damages, and that if the defendant, though in good faith, but merely for its own convenience, or according to its peculiar notions of doing business, has seen fit to send it (out of the direct and shortest route) to points out of the State, and thence back into the State, it was none the less *intrastate* commerce.

Unless the judge, upon the facts of this case, could instruct the jury as a matter of law that this was intrastate commerce, then the State has lost control of the rates and regulations of all interstate commerce, for freight could be thus shipped from Red Springs to Richmond, Va., and thence back to Greensboro, and rates charged accordingly, and free from any other regulations by the State. This would be true as to all other intrastate commerce.

However, both in this case and the *Speight case, supra,* the jury found that it was an intrastate message, as a matter of fact.

No error.

WALKER, J., concurs in result: He will add, though that the case of *Bateman v. Tel. Co.,* 174 N. C., 97, is not, in his opinion, an authority in favor of the decision, or that in *Speight v. Tel. Co.,* at this term.

In the *Bateman case*, the message could not be sent directly from Durants' Neck, N. C., to Plymouth, N. C., because there was, at that time, no line between those points, and, therefore, it had to be transmitted by way of Norfolk, Va. The judge charged the jury in that case as follows: "If the jury believe the evidence, and find therefrom that the message was transmitted in the usual, customary, and *necessary* route from Hertford, N. C., to Norfolk, Va., and relayed and transmitted from Norfolk, Va., to Plymouth, N. C., then the message would be an interstate message, and as such, interstate commerce, and the liability of the defendant is such only as is fixed and determined by the Federal law applicable thereto; . . . and mental anguish alone in such a case as this is not recognized by the Federal law as an element of damage for which a recovery can be had, . . . therefore, upon such finding, you will answer the third issue 'Nothing.'" With reference to this instruction, we said: "This charge, read in connection with the verdict, or the answer to the third issue, excludes the idea of bad faith on the part of the defendant, and goes further, for it establishes the fact that instead of there being any attempt to evade the law, the route selected by the defendant was 'the usual, customary, and *necessary* one.'"

There was no controversy there as to there not being a line of communication between the initial and the terminal points. It was conceded that there was not, and the only question was whether the necessity of sending out of the State to Norfolk, Va., and from there to Plymouth, N. C., would be interstate commerce, and we held that it would have that effect in law.

In the present case, there is a telegraph line connecting Red Springs, N. C., and Greensboro, N. C., and the jury has found that the defendant sent the message beyond the State, and by a circuitous and roundabout way to Greensboro, N. C., not in good faith, but with the fraudulent purpose of evading the operation of our State laws.

I concur in the result of the decision, but not in all of the reasoning by which it was reached.

BROWN, J., dissenting: I regret to differ with my brethren in the disposition of this case, for I realize that there are some cases of this character where telegraph companies should be held to liability for mental anguish under our State law. If this were an open question, I would unhesitatingly agree with my brethren. But investigation has convinced me that where the telegraph company has the choice of two methods of transmitting a telegram, one wholly within the State, and the other through a relay station outside the State, and the company chooses to transmit it outside the State, the transmission outside the State constitutes interstate commerce.

It has been settled by the Supreme Court of the United States, in *Hankey v. R. R.*, 187 U. S., 617, that where two points are in the same State, yet if in the transmission by a carrier any part of the route is in another State, it is interstate commerce. To bring the transportation within the control of the State as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State. This subject is discussed by *Mr. Justice Walker* in *Bateman v. Tel. Co.*, 174 N. C., 97. I think it is manifest from the language of the act of Congress of 18 June, 1910, that a telegram sent from a point in this State through another State and back into this State is interstate commerce, and comes within the purview of that act.

Section 1 of that act reads as follows: "The provisions of this act shall apply to . . . telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, territory, or district of the United States to any other State, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning . . . of this act: . . . *Provided, however,* that the provisions of this act shall not apply to the transmission of messages by telephone, telegraph, or cable wholly within one State, and not transmitted to or from a foreign country from or to any State or territory as aforesaid."

The only exception to the provision of that act is to the transmission of messages wholly within one State.

It is plain to me that under the act of Congress the manner of the transmission of the message and route it takes controls the question as to whether the message comes within the purview of the Federal statute. This seems to be the view of the Supreme Court of Kentucky in the case of *Telegraph Co. v. Lee*, 192 S. W., 70, in which the Court says: "But the statute in the exempting clause speaks of messages transmitted wholly within one State." It is also the view of the Supreme Court of South Carolina, in *Berg v. Tel. Co.*, 96 S. E., 248, in which the Court held that a telegram transmitted through a relay point outside the State to another point in the same State was an interstate message, and governed by the Federal law pertaining thereto, and in this connection the Supreme Court of South Carolina, referring to the proviso in the act of Congress above quoted, says:

"The words in the proviso to section 1 of the Interstate Commerce Act, 'that the provisions of this act shall not apply to the transportation of passengers or property . . . wholly within one State,' etc., and the words, 'nor shall they apply to the transmission of messages by telegraph, telephone, or cable, wholly within one State,' etc., were intended to declare that the transportation or transmission which was only partly within a State should be subject to the provisions of the Interstate Commerce Act, for the reason that only such portion of the instrumentalities used in the transportation or transmission, located in a particular State, can be subjected to the legislation of that State, but not of any other State. No other reasonable construction can be placed on that section."

See, also, *Davis v. Tel. Co.,* Missouri, 202; S. W., 292; also, *Tel. Co. v. Mahone* (Va.), 91 S. E., 157. In this case the message was sent from Norfolk, Va., to Tye River, in the same State, but was relayed through the city of Washington. It developed in the evidence that it was possible to send the message wholly within the State of Virginia, and it is apparent from the opinion of the Court that counsel for the plaintiff relied upon the same course of reasoning upon which is based the opinion of this Court. The Supreme Court of Virginia, however, held that the Court had nothing to do with the motives, but only with facts, *i. e.,* only with the question as to whether the message was actually transmitted through another State. The Supreme Court of Virginia said:

"The Supreme Court of the United States, however, has made it plain that in determining such questions they will only consider the facts and not inquire into motives. A local dealer in intoxicating liquors, who lived in the State of Kansas, and also maintained an office and warehouse in a small village, Stillings, on the Missouri side of the Missouri River, which was connected by a bridge with Leavenworth, Kan., transacted his business thus: After receiving his orders from his Kansas customers, he would make deliveries from his warehouse on the Missouri side of the Missouri River in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depot for transportation to other Kansas points. The State of Kansas sought to enjoin him from carrying on this business in violation of the laws of Kansas. He claimed that his business was interstate commerce, and the Supreme Court of the United States sustained his contention, saying: 'The Supreme Court of the State gave much weight to the dealer's past conduct and animating purpose, and relied upon the language quoted from *Austin v. Tennessee,* 179 U. S., 343; 21 Sup. Co., 132; 45 L. Ed., 224, and *Cook v. Marshall County,* 196 U. S., 261; 25 Syp. Ct., 233; 49 L. Ed., 471. Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings, had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the State, suffice to change the nature of the transactions.' *Kirmeyer v. State of Kansas,* 236 U. S., 568; 36 Sup. Ct., 419; 59 L. Ed., 721."

I am driven to the conclusion that where a message is actually transmitted through another State, although the point of origin and the point of destination are both within the same State, such message constitutes interstate commerce, irrespective of the motive which prompted the company in sending the message outside the State. I think it plainly deducible from the language of the Supreme Court of the United States, in *Kirmeyer v. State of Kansas,* 236 U. S., 568, quoted and commented on by the Supreme Court of Virginia in *Tel. Co. v. Mahone, supra.* See, also, *Tel. Co. v. Boles* (Va.), 98 S. E., 645, decided 13 March, 1919. In that case the Supreme Court of Virginia, referring to the *Mahone case,* says:

"It was contended in the *Mahone case,* as here, that, inasmuch as the message could have been sent over an intrastate route, the company could not impress upon it an interstate character by a different routing. But this Court held, upon authority, that the interstate character of the message must be tested by the actual facts as to its transmission, and not by the motives of the company; and, further, as a necessary corollary from the decision in the *Bolling case,* that the adoption by the company of an interstate route of transmission relegated the transaction to the domain of Federal control."

See, also, the opinion of the Supreme Court of Missouri in the case of *Taylor v. Tel. Co.,* 204 S. W., 818.

Under these authorities and others which can be cited, I am convinced that where it appears that the message was transmitted over wires running through more than one State, the fact itself is controlling and the Court cannot go into the questions of the motives of the company, although it may appear that there were routes wholly within the State over which the message might have been sent. There is no statute in North Carolina which makes it compulsory upon telegraph companies doing business within this State to transmit messages to points within the State over wires wholly within the State, and until such statute is enacted, I see no way by which telegraph companies can be restricted in the manner in which they shall transmit the messages of their customers. It must be admitted that the only duty the telegraph company owes to the customer is to transmit his message accurately and with celerity. If it can perform this duty as well by using one wire as another, I don't know any way by which its choice can be interfered with. I am not at all alarmed at the suggestion that the telegraph companies, by routing intrastate messages out of the State, can avoid the rate fixed by the State for such business. The State has the undenied right to fix the rate for transmitting messages between points in the State, provided the rate is reasonable and not confiscatory. This has been acquiesced in by the telegraph companies for many years, and it is too late now to question the power. By routing the message on wires running into an adjoining State and back into this State, the company cannot evade the State law fixing rates as long as it continues to do business in the State. The difference is this: There is a law fixing rates within the State on intrastate messages, but there is no statute requiring such message to be transmitted over wires wholly within the State. Therefore, the company can transmit them over any lines it sees fit if it discharges fully its duty to the patrons.

I admit that the decision of the Court in this case comes within the authority of *Speight v. Tel. Co.,* at this term. I was not present when the *Speight case* was decided, and take this opportunity to express my views with the purpose hereafter to cheerfully acquiesce in the judgment of my brethren.

ALLEN, J., concurs in this opinion.

M. W. STERNE ET AL. v. BAY STATE MILLING COMPANY.

(Filed 19 November, 1919.)

1. **Vendor and Purchaser—Contracts—Extension of Time—Burden of Proof.**
The burden of proof is upon the buyer to show that the seller granted him an extension of time he claims beyond that specified in his contract of purchase, in his action against the seller to recover damages for the defendant's breach thereof.

2. **Same—Evidence—Cancellation of Contract.**
Three carloads of flour were sold upon condition that they were to be ordered out by the purchaser within 30 days, unless a different date should be thereafter agreed upon, with carrying charges of 5 cents a barrel, if not ordered out on contract time, payable at the beginning of each period, and if goods were not ordered out, or on failure of purchaser on demand to pay carrying charges, the seller could terminate the contract and resell the goods for purchaser's account. After several months the seller wrote the purchaser asking for shipping instructions, suggesting future dates for shipment, and finally wired that unless shipping dates were wired within a specified time, with settlement of carrying charges, he would consider the order canceled. The buyer gave no reply to any of these letters. *Held*, no evidence of an extension of time granted by the letters under the terms of the contract, and the failure to answer the telegram was an implied consent to the cancellation of the contract.

APPEAL by defendant from *Lane, J.,* at May Term, 1919, of GUILFORD.

This is an action to recover damages for the failure and refusal of the defendant to ship flour according to contract.

On 14 June, 1915, the plaintiffs purchased from the defendant, for their bakery, one carload of flour (210 barrels), and in November, 1915, again bought two carloads, of 210 barrels each.

On 29 July, 1916, defendant wired the plaintiff, "Unless you authorize by wire today, permission to ship by 15 August remaining three cars of flour on books for you, with full carrying charges added, we will understand you prefer order canceled. Impossible to carry beyond 15 August."

Between 29 July, 1916, and 7 August, defendant sold the three carloads in question, and the plaintiff brings this action to recover the loss which they allege accrued by their having to purchase flour at a higher rate at that time. Verdict and judgment for plaintiff. Appeal by defendant.

T. C. Hoyle and King & Kimball for plaintiffs.
Jerome & Scales for defendant.

CLARK, C. J. The letters and telegrams constituting the correspondence between the parties are in evidence. Under the contract of purchase of the carload, 14 June, 1915, it was to be delivered prior to 1 January, 1916, and the two carloads bought 22 November, 1915, were to be shipped prior to 1 July, 1916. Both these contracts contained the following provision: "Unless otherwise specified herein, goods are to be ordered out within 30 days from this date. Buyer to pay carrying charges of 5 cents a barrel on flour, and 25 cents a ton on feed for each period of 30 days, or fraction thereof, on goods not ordered out within contract time, payable at beginning of each period; also, all advances in freight after contract shipment time. At the end of contract shipment time, or of any succeeding thirty-day period, or other agreed time, unless goods are ordered out, or on failure of buyer on demand to pay carrying charges, seller may terminate contract and resell goods for buyer's account. No verbal condition or modification is valid.

M. W. STERNE & SON, Buyer,
By G. D. Sterne.
C. F. RUST, Agent for Seller."

The plaintiffs allege an extension of time by agreement to certain dates specified in the complaint. The burden was upon the plaintiffs to prove such agreement. The defendant wrote the plaintiffs on 15 May, 1916; 27 May, 1916, and 19 July, 1916, asking for shipping instructions, and suggesting certain dates and asking if they would be satisfactory to the plaintiffs. The plaintiffs made no reply to these letters, and on 29 July, 1916, the defendant wired the plaintiffs as follows: "Unless you authorize by wire today permission to ship by 15 August, remaining three cars flour on books for you, with full carrying charges added, we will understand you prefer order canceled. Impossible carry beyond 15 August."

The plaintiffs made no reply to this telegram. The plaintiffs content themselves with the proposition that the defendant, having named shipping dates, they had, by their silence, given consent thereto. Strangely enough, they do not hold that the same rule, if valid, would apply to the telegram of defendant of 29 July, 1916, to which they made no reply, and by the same rule consented to the cancellation of the order.

The plaintiffs testified: "We have never paid or tendered any carrying charges for the cars of flour in suit." They also testified: "We did not reply to the letters of 16 and 27 May, 1916, or 19 July." This was an offer needing acceptance. While the plaintiffs admit they received the wire canceling the order unless replied to, they did not answer it. Upon the whole correspondence there was no evidence that the time of shipment was extended by agreement. The offer of 27 May, and 19 July, before acceptance was withdrawn by telegram of 29 July. Besides the failure to meet the demand in that telegram, for payment "of full carrying charges" authorized defendant by the terms of the contract to cancel.

Even if the time of shipment had been extended by agreement the plaintiff's failure to give shipping directions was fatal. *Hughes v. Knott,* 138 N. C., 105. We agree with the defendant's contention that it "could not be required to take the risk of shipping without instructions, because the plaintiff might have required that the point of destination be other than Greensboro. The plaintiffs might have resold the flour or have desired it shipped to other points."

If the plaintiffs' failure to answer the defendant's letters of 15 and 27 May, and 19 July was an acceptance of the dates of shipment therein proposed their failure to answer the telegram of 29 July, "with remittance of full carrying charges added," was equally an acceptance of the condition that the contracts would be canceled unless reply was made that day with remittance demanded.

The motion for nonsuit should have been allowed.

Reversed.

JOSEPH BILYEU v. MRS. FLORENCE BECK.

(Filed 19 November, 1919.)

Negligence—Automobiles—Parent and Child—Principal and Agent—Motions —Evidence—Nonsuit—Trials.

In order to recover of the owner of a car damages caused by his daughter driving it at the time of the injury, there must be evidence that the daughter, experienced therein and more than twenty-one years of age, was acting as the agent of her father at that time, and where the evidence tends only to show that the daughter was acting solely for herself, and not in any manner for her father, the latter may not be held liable in damages; and a motion as of nonsuit is properly allowed.

APPEAL by plaintiff from *Shaw, J.*, at the May Term, 1919, of MOORE.

This is an action to recover damages for personal injury, alleged to have been caused by the negligence of the defendant.

The plaintiff was riding a bicycle along a public road on 23 March, and was injured by being run over by an automobile, driven by the daughter of the defendant, who was over twenty-one years of age, and an experienced driver.

The plaintiff examined the defendant before the trial under section 864, *et seq.*, of the Revisal, and this examination was introduced in evidence on the trial to prove that the defendant was the owner of the car.

The defendant was not in the car at the time of the injury, and there is no evidence that the car was being used on any business or mission of the defendant.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Hoyle & Hoyle, G. H. Humber, and L. B. Clegg for plaintiff.
U. L. Spence for defendant.

ALLEN, J. The evidence of the negligence of the daughter, who was driving the automobile, is not satisfactory, but conceding that it was sufficient to be submitted to the jury, and also that there is evidence that the defendant was the owner of the automobile, these facts alone would not establish the liability of the defendant for the injuries which the plaintiff has sustained.

This was expressly decided in *Linville v. Nissen*, 162 N. C., 99, where it is said, "The owner of an automobile is not liable for personal injuries caused by it merely because of his ownership"; and, again, "Even if the son had been the servant of his father in driving the machine, the father would not be liable for his negligence unless his son was at the time acting in the scope of his employment and in regard to his master's business."

The responsibility of the parent for the negligence of the child of mature years, and of experience as a driver, is not dependent on the ownership of the machine, but upon the principles of agency, express or implied, and in this case there is no evidence that the daughter was on any mission or performing any service for the defendant, her mother.

The two cases on which the plaintiff chiefly relies, *Williams v. May*, 173 N. C., 78, and *Wilson v. Polk*, 175 N. C., 490, are easily distinguishable.

In the first, it was in evidence that the father bought a car for the use of his family, and employed one Orendorff to teach his minor child to run it, and while in this employment the plaintiff was injured, and in the second, there was evidence that the owner was in the car at the time of the injury, and that it was going on a mission to her farm for her.

In our opinion, the motion for judgment of nonsuit was properly sustained.

Affirmed.

HENRY WINCHESTER, ADMINISTRATOR, v. MARY W. WINCHESTER ET AL.

(Filed 19 November, 1919.)

1. **Trusts— Mortgages— Sales— Foreclosure — Purchasers — Mortgagors — Deeds and Conveyances—Issues—Judgments—Evidence.**

   The widow and administrator of the deceased husband, who had joined in his deed in trust on lands to secure bonds or notes given to third persons, may bid in the lands at the trustee's foreclosure sale at its full value and obtain title, and upon the suit of a second mortgagee, or his personal representative to set aside the foreclosure sale and to declare the deed to the widow void as to creditors, the question as to whether the sale was made at the request of the holders of the bonds or the widow is immaterial, and will not affect the judgment rendered in her favor, nor will the refusal of issues tendered, but not supported by the evidence, be held for error.

2. **Appeal and Error—Objections and Exceptions—Instructions—Contentions.**

   For exceptions based upon an alleged erroneous statement of a party's contention by the trial judge to the jury, to be considered on appeal, it must appear that the judge was requested to correct his statement at the time, and failed or refused to do so.

APPEAL by plaintiff from *Adams, J.*, at April Term, 1919, of MECKLENBURG.

On 1 August, 1913, Dr. F. M. Winchester and his wife, Mary W. Winchester, executed to J. H. Little, trustee, a deed of trust on the property in question, securing the payment of two notes or bonds, one in the sum of $1,200, due Margaret A. Hilton, and one in the sum of $1,000, due P. S. McLaughlin. On 6 May, 1918, said trustee foreclosed the said deed of trust, and the defendant, Mary W. Winchester, purchased said property at said sale for $3,000. The plaintiff's intestate held a second deed of trust on said property, and brings this action to set aside the foreclosure sale, and to have the deed to said Mary W. Winchester declared void, or for judgment that she account to plaintiff and other creditors for the alleged difference between the purchase price of the property and the fair market value thereof, alleging that she procured the sale by the trustee to hinder and delay and defeat the claim of the plaintiff and other creditors of Dr. Winchester, and that she purchased the property for a grossly inadequate consideration. The court found, in response to the issues that Mary W. Winchester qualified as executrix on her husband's estate, which is indebted to the estate of the plaintiff's intestate in the sum of $480, and that the market value of the lot at the time of the sale was $3,000. Judgment in favor of defendant, and appeal by plaintiff.

Brenizer & Taylor for plaintiff.
Stewart & McRae for defendants.

CLARK, C. J. The jury found, by consent, that Mary W. Winchester was executrix of the estate of Dr. F. M. Winchester, and that the estate owed the plaintiff $480, and upon the evidence that the lot bought by Mary W. Winchester brought its full value. The plaintiff excepted, because the court did not submit to the jury four other issues, whether the sale was made at the request of the defendant executrix, or at the request of the owners and holders of the bonds secured by the mortgage; whether the executrix procured the sale to be made for the purpose of obtaining title to the land for herself, freed from the claims of the plaintiff and other creditors, and lastly, whether she procured the sale to be made to defeat the claim of plaintiff and other creditors. *Monroe v. Fuchtler,* 121 N. C., 101.

It was not error to refuse to submit these issues, among other reasons, because there was no evidence to justify doing so, except as to the issue suggested as to whether the owners and holders of the bonds secured by the deed of trust to Little, trustee, requested him to make the sale, and it was no error to refuse to submit this issue because it would not have affected the judgment even if the issue had been found as the plaintiff desired.

Besides, the finding of the jury that the plaintiff paid full value for the property, it must be noted that *Froneberger v. Lewis,* 79 N. C., 426, relied on by the plaintiff, has no application, for the defendant executrix was not buying at a sale made by herself, but was purchaser at a sale made by the trustee in the deed of trust. Moreover, she had an interest to protect, for she had joined in the mortgage releasing her right of dower, and it was not improper that she should protect herself by buying the property.

As for the alleged error in reciting the contentions of the parties, this cannot be considered unless it appeared that counsel at the time called the matter to the attention of the court, and asked that it be corrected. *Bradley v. Mfg. Co.,* 177 N. C., 155, and cases there cited.

No error.

J. W. HUNTER v. SAMUEL GERSON.

(Filed 19 November, 1919.)

Damages—Contracts—Instructions—Appeal and Error—Prejudicial Error—Deductions—Verdict.

Where a contract for the sale of rails and fastenings was for the agreed price as they laid fastened to a railroad bed, it is reversible error, to defendant's prejudice, for the trial judge to charge the jury upon the measure of damages, that it would be the difference between the price at which defendant contracted to sell them and the fair market value f. o. b. at a certain station at the time of the defendant's breach, the correct rule being that it is such value at the time and place fixed by the contract for delivery, in this case, as they lay fastened in the roadbed. *Held, further,* that *Rhyne v. Rhyne,* 151 N. C., 401, as to deduction for services rendered, did not apply, it appearing from the verdict that the deduction had been made by them without regard to the charge.

CIVIL ACTION, tried at February Term, 1919, of MECKLENBURG, upon certain issues submitted to the jury.

From the judgment favoring the plaintiff, the defendant appeals.

Cansler & Cansler and Morrison & Dockery for plaintiff.

J. F. Newell, Clarkson, Taliaferro & Clarkson, and J. D. McCall for defendant.

BROWN, J. This action is brought to recover damages for a breach of contract in the sale of the rails and fastenings of the Eddie Lake & Northern Railway Company, as the same lay on the railroad bed. Fifteen issues were submitted to the jury, which it is not necessary to set out. The jury found that the contract was duly entered into by the defendant, and that the defendant wrongfully failed and refused to comply with the contract, and wrongfully refused to permit the plaintiff to take up and remove the rail and fastenings. The jury assessed the damages in favor of the plaintiff. According to the finding of the jury, the plaintiff bought the rails as they lay on the roadbed. His Honor instructed the jury as follows:

"As to the other rails and fastenings, then, which the plaintiff contends the defendant contracted and agreed to sell him over and above the six hundred tons just referred to, the court charges, if you answer the first, third, fourth, fifth, and sixth issues 'Yes,' then as to the rails and fastenings embraced in the contract referred to in the first issue, other than the six hundred tons, the measure of damages, plaintiff's damages would be the difference between the price at which the defendant contracted to sell them, and their fair market value, f. o. b. the cars at Conway, S. C., at the time of the defendant's breach of the contract, if you find there was such breach."

To which the defendant excepted. The instruction is erroneous. All the testimony tended to prove that the contract was that the defendant was to take the rails on the roadbed and not f. o. b. at Conway. There was evidence tending to prove that it would cost about $9,400 to take up and remove the rails, consequently the rails are worth much less on the roadbed than they would be on the cars at Conway.

The rule for assessment of damages in a case like this is well settled, and it is the difference between the contract price of the rails and their fair market value at the time and place fixed by the contract for their delivery.

Lumber Co. v. Furniture Co., 167 N. C., 565; *Lumber Co. v. Mfg. Co.,* 162 N. C., 395; *Berbarry v. Tombacher,* 162 N. C., 497. In the first case cited above, the Court says: "The court gave correct instructions as to the rule for admeasuring the damages, it being the difference between the contract price and the market price at the place and time appointed by the contract for the delivery. This is the standard of adjustment, as between the parties where there has been a breach, or failure to deliver, from a very ancient period, and is, we believe, universally adopted as being in reality the only one for our safe guidance, and a very just one, too."

The error of the court lay in fixing the market value of the rails f. o. b. cars Conway, S. C., as the criterion, instead of their market value as they lay on the roadbed.

The learned counsel for plaintiff very earnestly insisted that the Court could deal with this case as it did with *Rhyne v. Rhyne,* 151 N. C., 401. In that case the Court held that the judge erred in his instructions to the jury in not directing them to allow a certain deduction for the value of the son's services, but we were of opinion that it appeared from the verdict that the jury, without regard to the charge, had made the deduction, and that, therefore, the error was harmless.

From an examination of the issues and evidence, we are unable to say that the error was harmless in this case. We think the instruction was not only erroneous, but very probably misled the jury, to the defendant's detriment.

New trial.

SWIFT AND COMPANY v. JAMES TEMPELOS, TRADING AS THE "BUSY BEE CAFE," AND J. E. BEFARRAH.

(Filed 12 November, 1919.)

1. **Statutes—Common-law Right—Sales in Bulk.**

The statute making void as against creditors a sale of a large part or the whole of a stock of merchandise in bulk, unless the requirements of the act are complied with, is in derogation of the common law, and must be strictly construed. Gregory's Suppl. Pell's Revisal, sec. 964a.

2. **Same—"Merchandise"—Restaurants—Provisions—Furniture—Fixtures.**

Within the intent and meaning of our statute relating to the sale of merchandise in bulk, the word "merchandise" is limited to things ordinarily bought and sold in the way of merchandise, the subject of commerce and traffic, and does not include a stock of provisions or supplies kept in a restaurant to be prepared and served to its customers for meals, or to the furniture and fixtures used therein in connection with conducting the business of a restaurant.

CIVIL ACTION, tried before *Allen, J.,* at January Term, 1919, of WAKE.

The plaintiff alleged that the defendant, James Tempelos, who owned and conducted an ordinary restaurant in the city of Raleigh, at No. 225 South Wilmington Street, known as the "Busy Bee Cafe," was, at the commencement of this action, indebted to it, for goods sold and delivered, in the sum of $755.90, which has been due since 12 November, 1917, and that while that amount was still due to it, the defendant sold and conveyed to his codefendant, J. E. Befarrah, all the property in said restaurant, consisting of canned goods and other groceries and food supplies, and the furniture and fixtures used in connection with the business, for $2,300, and that the sale was made in bulk, contrary to the "Bulk Sales Law" (Gregory's Suppl. to Pell's Revisal, sec. 964a), which reads as follows: "The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be *prima facie* evidence of fraud, and void as against creditors of the seller unless the seller," etc. Plaintiff, therefore, alleges that, as the requirements of that act were not complied with by the parties to the sale it is void and of no effect against the creditors of the defendant, James Tempelos. Plaintiff prays judgment for the debt, and that the property be seized and applied to its payment.

Defendant answered and denied the material allegations, except as to the debt due the plaintiff and the sale of the goods.

The jury returned the following verdict:

"1. Is the defendant Tempelos indebted to the plaintiff, and if so, in what amount? Answer: $755.90, and interest from 12 November, 1917.

"2. What was the value of the goods purchased from Tempelos by the defendant Befarrah, other than the fixtures, that is to say:

"(1) What was the value of the eggs? Answer: $200.

"(2) What was the value of all, including the eggs? Answer: $450."

The court gave judgment against J. E. Befarrah for $450, and directed that the $200, the value of the eggs, which had been attached, be applied to it as a credit thereon. It also adjudged that the property, which was sold by Tempelos to Befarrah, be seized under execution, or other legal process, and sold for the satisfaction of the balance of the judgment. There seems to have been no judgment for the debt of $755.90 against James Tempelos, but that may not be material in the view taken of the case, and may yet be entered below, if desired, when the case is remanded for judgment there.

Defendant, James Befarrah, appealed from the judgment.

J. M. Broughton for plaintiff.
J. C. Little and Manning, Kitchin & Mebane for defendant.

Walker, J., after stating the facts as above: The question is, Whether the goods and fixtures used in a restaurant, which is conducted on the ordinary plan, is a "stock of merchandise" within the words and meaning of the "Bulk Sales Act," copied above? We do not think that they come within that designation. The "Bulk Sales Act" is in derogation of the common law, and must be strictly construed. *Fairfield Shoe Co. v. Olds,* 176 Ind., 526; *Cooney v. Sweat,* 133 Ga., 511, 512; *Taylor v. Folds,* 2 Ga. App., 453; 9 Current Law, 1511.

It is said that the word "merchandise" is usually, if not almost universally, limited to things which are ordinarily bought and sold, in the way of merchants, and as the subjects of commerce and traffic. *Van Patten v. Leonard,* 55 Iowa, 55; Burwell's Law Dictionary. The word came into use as a term descriptive of the goods and wares exposed to sale in fairs and markets. *Passaic Mfg. Co. v. Hoffman,* 3 Daly (N. Y.), 495-512. Speaking of an innkeeper, it is said in *Toxaway Hotel Co. v. Smathers,* 216 U. S., 439-446, and it may be affirmed with great force and significance of a restaurateur: "To say that he buys and sells articles of food and drink is only true in a limited sense. Such articles are not bought to be sold, nor are they sold again, as in ordinary commerce. They are bought to be served as food and drink, and the price includes rent, service, heat, light, etc. To say that such a business is that of a 'trader' or a 'mercantile pursuit' is giving those words an elasticity of meaning not according to common usage." The specific subject is treated with closer reference to our facts, and more at large, in the case of *In re Wentworth Lunch Co.,* 159 Fed. Rep., 413, where it is held, pp. 414-415:

"The specific categories of the section are corporations engaged principally in printing, publishing, and mining, under which, clearly, a restaurant company does not fall. It remains to inquire whether it falls within the general categories of the section, viz., corporations engaged principally in manufacturing, trading, or in mercantile pursuits. In one sense of the word, transformation of raw provisions into cooked dishes is manufacturing; but no one would ever speak of a cook as a manufacturer, and that category may be excluded. A trader is one who buys to sell again, a definition which might apply to a saloon, but not to a restaurant, where the proprietor does not sell the provisions he buys in the form in which he buys them, but changed by combination and cooking into edible dishes. The word 'mercantile,' though including trade, is larger, being extended to all commercial operations, so that we speak of shipping merchants, commission merchants, and forwarding merchants. Still we do not think that the dishes of a restaurant would ever be described as merchandise, or the proprietor as a merchant, or as engaged in mercantile pursuits. Printing and publishing companies were specified, presumably because they did not fall within the general categories, and we think the same reasoning applies to a restaurant company." See, also, *In re Chesapeake Oyster & Fish Co.,* 112 Fed. Rep., 960, and *In re Excelsior Cafe Co.,* 175 Fed. Rep., 294, where it is said: "A trader is one who buys to sell again, a definition which might apply to a saloon, but not to a restaurant; and, further, the Circuit Court of Appeals, in that opinion (*Matter of Wentworth Lunch Co., supra*), holds that the word 'mercantile' is not broad enough to cover the business of keeping a restaurant for the cooking and selling of food. This case is the latest and the controlling decision upon the question." The Supreme Court of Iowa had this question before it, and held, that the permission, in a contract, to use the building for "any mercantile purpose," granted pursuant to plaintiff's application, does not authorize the use for a restaurant, which is not a mercantile purpose. The word "mercantile" means "pertaining to merchants, or the business of merchants; having to do with trade, or the buying and selling of commodities; commerce" (Webster). The business of keeping a restaurant is in no sense commerce. If a restaurant be a mercantile establishment, the term is equally applicable to taverns, boarding-houses, and the like, which cannot be admitted. The point demands no further attention. Permission to use a building for "any commercial purpose" does not authorize its use as a restaurant. 81 Iowa, 727-729. This case was approved in 92 Iowa, 293.

The Federal cases cited above arose under the Bankrupt Act, but this fact did not in any degree influence the decisions of the Courts. They considered the question as one of general law, and construed the statute according to the ordinary, natural, and popular meaning of its language, and as understood among merchants and traders. *In re Kingston Realty Co.,* 160 Fed. Rep., 445; *In re N. Y. & W. Water Co.,* 98 Fed. Rep., 711-713; *In re U. S. Hotel Co.,* 134 Fed. Rep., 225. Referring to the business of the tavern-keeper, and quoting from *Newton v. Trigg,* 1 Showers, 96, *Justice Lurton* says, in the *Hotel Co. case:* "He doth not get by buying and selling, but by the price and hire of his lodging; also by the profit on the ale of his kitchen. The profits from his stables do not arise from hay alone, but from the standing." *Gallagher v. DeL. S. Co.,* 158 Fed. Rep., 381.

In that case the Court said: "I think it so clear that the corporation (engaged in keeping a boarding stable) was principally engaged neither in trading nor in mercantile pursuits that discussion is unnecessary. It is well settled that a trader or a merchant is a person who is engaged in the business of buying and selling, one who buys in order to sell; and I think it must be conceded that the foregoing facts do not bring the bankrupt within either class—if, indeed, the two classes should be distinguished."

And finally, in the case of *In re Willis C. & A. Co.,* 178 Fed. Rep., 113-114, it was said: "It was carefully pointed out (in the *Wentworth Lunch Co. case, supra*) that the preparation of food by cooking was not manufacturing, and that the sale of the food so prepared by an incorporated restaurant-keeper in small quantities to the ultimate customer was not a mercantile or trading occupation. Preparing pies by the thousand and biscuits by the ton might perhaps savor of manufacturing; but it is obvious that the vending thereof to the consumer on the premises is something not to be performed by one engaged in mercantile or trading pursuits. . . . It is plainly impossible to draw any practical distinction between feeding men and feeding horses."

The words, "stock of merchandise," in our statute are used in the common and ordinary acceptation of those terms, and mean the goods or chattels which a merchant holds for sale, and are equivalent to "stock in trade," as ordinarily used and understood among merchants and tradesmen. *Off & Co. v. Morehead,* 126 Am. St. Rep., 184-187.

But it is contended that it was held in *Plass v. Morgan,* 36 Wash., 160, that a restaurant or cafe comes within the meaning and operation of the "Bulk Sales Law," but a careful reading of that case leads us to believe, without much hesitation, that the learned Court based its decision entirely upon the peculiar and "comprehensive" language of their statute, and it appears that, if it had not been for this feature of the case, the result would have been different. And we say so, because counsel for the respondent there contended that the law uses the special term, "stock of merchandise," which, according to accepted English definitions, relates to the business of merchandising alone, and was clearly so intended by the Legislature; that Courts will not so construe the language of the statute as to make it include that which its plain and usual meaning will not import, or render its application absurd or ridiculous in its operation. In answer to this suggestion, the Court, after repeating the contention, stated that the learned counsel, however, did not strictly quote the language of their statute. "It does not use the special term, 'stock of merchandise,' but uses the term, 'any stock of goods, wares, or merchandise in bulk.' The word 'any' is comprehensive, and so is the word 'stock.' There is no limit placed by the Legislature on the meaning of the word 'stock.'" The Court laid great stress upon the use of the words, "*any* stock of goods and wares," which are not in our statute, and seemed to think, when replying to counsel's argument, that a "stock of merchandise," by itself, would be too restricted and not be sufficient in its scope to include a restaurant or cafe, and if this be not so, why suggest to counsel the difference between his language and that of the statute, if the two were synonymous, one not embracing any more, in meaning, than the other. And it was said, in *Johnson v. Kelly,* 155 N. W. (N. Dak.), 683, that the Washington Court, in the later cases of *Albrecht v. Cudihee,* 37 Wash., 206, and *Everett v. Smith,* 40 Wash., 566, had practically receded from its holding in the earlier case. We need not express an opinion as to whether this be correct or not.

The Court said, in *Johnson v. Kelly, supra:* "The decision in *Plass v. Morgan* is based upon the terms of their bulk-sales statute, voiding sales of 'any stock of goods, wares, and merchandise.' The word 'any' was held to broaden the statute, making it apply to 'any stock,' which therefore covered restaurant stocks. Our statute does not so read, but by its plain terms applies only to stocks of merchandise or goods, a part of 'mercantile stock or supply which is kept for sale.'" It also is true that the Court distinguished that case from one like ours by directing attention to the special words of the local statute, emphasizing the use of the word "any," and laid stress upon the use of the other words, "goods and wares." So that the case, when properly considered, lends strong support to our conclusion.

The statute was evidently intended to apply to a stock of merchandise, in the sense of a stock of goods which have been bought for resale in a substantially unchanged condition, and not to a stock of provisions on shelves, or in a pantry, or storeroom, kept for no other purpose than to supply the tables, and provide meals for the patrons and customers of the restaurateur. This is not selling articles kept in stock, but furnishing meals to those who come for them at a stated price. The groceries are not bought by him in the raw state, and some of them have completely lost their identity when prepared for the table. The customer buys only a meal to satisfy his hunger. This is not selling at retail, according to our common understanding. The statute contemplates a stock, which is itself kept for sale, and when there is a sale out of the ordinary and regular course of business, it is fraudulent, if in other respects it violates the provisions of the statute.

Learned counsel for the plaintiff has cited us to several cases, which he contends are analogous to this one, where it was held that the sales of the stocks were governed by the statute, but we do not see the similarity, and we think they can easily be distinguished, such as the stocks of drug stores, saloon-keepers, retailers of crackers and biscuits, butchers who sell meat products, stock of a garage (*Gallup v. Rozier,* 172 N. C., 283), and others, perhaps, of like kind could be mentioned, but they are not parallel cases.

If we should hold that this stock was within the "bulk-sales" statute, it would seem that it should be extended also to a stock of supplies or provisions kept by a boarding-house proprietor, and we would long hesitate before coming to such a conclusion. As said in one of the cases cited by us (216 U. S., 439), such a view of the law would be utterly inadmissible, and, we may add, indefensible.

As to the furniture and fixtures used in the business of the keeper of the cafe, they are not kept for sale, and are not within the provisions of the statute. Now, if this stock itself is within it, it may be that, when the furniture and fixtures are sold with it, so as to be, in fact, a "clean-up" sale of the whole business, the appellee's position might, perhaps, be correct, but we do not decide, or intimate any opinion as to such a question. Our view coincides with that of the Court which decided *Gallus v. Elmer,* 193 Mass., 106, and, as it is clearly expressed in that case, we state it in the language there used: "The plaintiff still further insists that the statute does not apply to the fixtures, and this view seems correct. The phrase, 'stock of merchandise,' as used in the statute, properly and naturally describes articles which the seller keeps for sale in the usual course of his business. It does not naturally describe fixtures. It would hardly be within the usual course of business for a storekeeper at any time to sell his fixtures, and it is not to be presumed that the Legislature intended to prohibit the sale of a fixture, unless such intent is clearly expressed. The natural reading of the statute makes it applicable, as has been said, only to the articles which in the ordinary course of his business the seller keeps for sale, and that must be taken to be its legal meaning," citing *Albrecht v. Cudihee,* 37 Wash., 206.

We are constrained to think that the learned judge was in error when he held that the sale of the cafe stock was governed by the bulk-sales statute, and, therefore, was fraudulent and void within the meaning and intent of the same, the defendants not having complied with its terms.

This being so, the evidence fails to establish any cause of action, under the statute, and none is stated in the complaint against J. E. Befarrah. This suit should, therefore, be dismissed as to him, and judgment to that effect will accordingly be entered below. Plaintiff may have judgment upon the verdict against James Tempelos, its debtor, if so advised.

Error.

J. R. PRICE AND J. H. EDWARDS, ADMINISTRATORS OF S. J. EDWARDS, AND J. H. EDWARDS, INDIVIDUALLY, v. J. S. EDWARDS, MRS. ALICE G. HILL, AND MRS. J. E. MOORE.

(Filed 12 November, 1919.)

1. **Evidence—Deceased Persons—Against Interest.**

The testimony of an heir at law as to a partnership with deceased, claimed by another of the heirs at law, which is against his interest, is not incompetent under the statute prohibiting testimony of transactions and communications with deceased persons.

2. **Partnership—Statutes—Assumed Names.**

The intent of chapter 77, Public Laws 1913, requiring that a partnership under an assumed name shall file a certificate in the office of the clerk of the Superior Court setting forth the name under which the business is conducted, with the full names and addresses of the persons owning and conducting it, etc., was to prevent fraud or imposition upon those dealing therewith, and to afford them means for knowing the status and responsibility of the concern with which they deal, and does not apply between partners who are presumed to know these conditions; and a surviving partner may maintain his action against the heirs of the dead one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted in the name solely of the dead partner, and the requirements of the statute had not been complied with.

3. **Same—Legitimate Business—Actions Between Partners.**

Whether a contract founded on an act in contravention of a statute is void without being expressly declared so depends in a great measure upon the intent of the statute, as disclosed by a proper interpretation; and where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves, chapter 77, Public Laws 1913, does not apply, and an action of the silent partner to recover his share of the assets from the other is not founded upon any wrong, and the principles relating to such transactions do not apply, or avoid his recovery.

4. **Statutes—Penal—Interpretation—Intent—Common-law Right.**

Chapter 77, Laws 1913, to regulate the use of assumed names in partnerships, imposes a fine or imprisonment upon the failure of the parties to comply with its provisions in not filing the name of the concern, and of the partners therein, etc., is a derogation of a common-law right, and will not be extended by construction, but strictly construed as to the legislative intent.

5. **Judgments—Estoppel—Executors and Administrators—Sales—Partnerships.**

Certain farm products owned by the deceased and his administrator were sold at private sale by the latter, under an order of court. *Held*, the question of ownership of the products, or the separate property right of the administrator therein, was not included in the adjudication of sale, and the order does not operate as an estoppel in a subsequent action by the administrator to recover his share of the purchase price.

6. **Judgments—Records—Estoppel—Parties—Privies.**

A court record of an action or proceeding, considered as a memorial of a judgment, imparts absolute verity, and may be collaterally impeached by no one; and the judgment itself has the further effect of precluding a reëxamination into the truth of the matters decided, and is binding upon the parties to the proceedings and their privies, the further and secondary effect of the record considered as a judgment being an estoppel upon them as *res judicata*.

CIVIL ACTION, tried before *Shaw, J.*, and a jury, at March Term, 1919, of STANLY.

Defendants appealed.

This proceeding was brought by the administrator for a final settlement of the estate of S. J. Edwards, the decedent, J. H. Edwards, suing as administrator and in his individual capacity. The intestate left no lineal descendants. His brothers and sisters are: J. H. Edwards, one of the plaintiffs, J. S. Edwards, Mrs. J. E. Moore, and Mrs. Alice G. Hill, who are his next of kin and the distributees of his estate.

S. J. Edwards, at the time of his death, was conducting a mercantile business in the town of Oakboro, in the name of S. J. Edwards. His brother, J. H. Edwards, claimed to be a partner in said business and to own a one-third interest in the same. The defendants, Mrs. J. E. Moore and Mrs. Alice G. Hill, filed answers in which they denied that J. H. Edwards was a partner in said business; they also pleaded chapter 77, Public Laws 1913, in bar of J. H. Edwards' right to recover as such partner, even if it should be found that he owned a one-third interest in said business.

The court submitted two issues to the jury, as follows:

"1. Was the plaintiff, J. H. Edwards, a partner, owning a one-third interest in the business conducted by S. J. Edwards at the time of his death, as alleged by J. H. Edwards?

"2. If so, did the partnership do business in the name of S. J. Edwards without filing in the office of the clerk of the Superior Court of Stanly County a certificate conforming to the requirement of chapter 77, Public Laws 1913, as alleged by the defendants?"

Both issues were answered "Yes."

The other matters embraced in the complaint were reserved to be referred to some one to take evidence and make report of his findings. Some, if not all of these matters, were afterwards settled by agreement filed in the record.

The court entered the following judgment:

"It is, therefore, ordered and adjudged that the plaintiff, J. H. Edwards, was a partner, owning one-third interest in the business conducted by S. J. Edwards at the time of his death, as alleged by J. H. Edwards; it is further ordered that the administrators of S. J. Edwards, deceased, pay the said J. H. Edwards one-third of the proceeds of the said partnership business before final distribution is made, not to exceed one-third of $5,005.49. This cause is retained for further directions."

There was an agreement as to the settling of certain matters not affected by the questions in this appeal.

Judgment was entered upon the verdict, and the defendants, Mrs. Hill and Mrs. Moore, appealed.

Smith & Gooch for plaintiffs.
Stack, Parker & Craig for defendant, Mrs. L. J. Moore.
Brock & Henry for defendant, Mrs. Alice Hill.

WALKER, J., The exceptions must be overruled.

1. The evidence of J. S. Edwards had a tendency to establish the existence of the partnership, and was, therefore, relevant (*Gaylord v. Respass,* 92 N. C., 553; *Fraley v. Fraley,* 150 N. C., 507), and the witness was competent, as he was testifying against his own interest. He is not disqualified in such a case. *Bunn v. Todd,* 107 N. C., 266; *Tredwell v. Graham,* 88 N. C., 208; *Weinstein v. Patrick,* 75 N. C., 344, and *Seals v. Seals,* 165 N. C., 409, where the subject is fully discussed. In the *Treadwell case, supra,* it was said: "Notwithstanding the statute, a party may be called to testify touching a transaction of the opposite party, when it is against his own interest." In *Weinstein v. Patrick, supra,* the Court said: "It would seem that there could be no objection against allowing a witness to testify against his own interest." And in *Seals v. Seals, supra:* "It is not within the spirit or letter of the statute, as his own interest is supposed to be a sufficient protection for the opposite party against false or frabricated testimony. This appears to be well settled by the cases. Harris Seals, the witness, proposed to testify against his own interest, as his brother would get the land and exclude him if the jury should be influenced by his testimony."

2. The defendants contend that plaintiff, J. H. Edwards, cannot recover his interest of one-third in the partnership property as a mem-

ber of the firm, because he and his partner, the intestate, had formed the partnership and transacted its business under an assumed name, or under a designation, name, or style other than the real name, or names, of the individual, or individuals, owning, conducting, or transacting such business, without complying with the provisions of Public Laws 1913, ch. 77, and especially without filing a certificate in the office of the clerk of the Superior Court, setting forth the name under which the business was conducted, with the full names and address of the persons owning and conducting the same. We think it is apparent from the terms of the statute, when it is read and considered as a whole, and with special reference to its qualifications and restrictions, that it does not apply to a case like this one, where no question arises as to the rights of third persons, but the only question is whether one partner is entitled to his share of the partnership effects, in an action brought to settle and distribute the estate of a deceased partner. No good reason can be assigned, or, at least, none has been suggested, why such a statute should defeat the recovery of his share by the living partner, where no third person is involved, but only the partners themselves in relation to transactions wholly *inter se*. The intent and object of the statute was to require notice to be given to the business world of the facts required to be set out in the certificate, to the end that people dealing with a firm may be fully informed as to its membership, and know with whom they are trading, and what is the character of the firm, and the reliability and responsibility of those composing it. An examination of the case of *Courtney v. Parker,* 173 N. C., 479, which construed the statute in relation to a sale of building material and the right of the plaintiffs, a partnership, which had not complied with the statute, to recover the price thereof, will show that this is true. It is there said that "it is a police regulation to protect the general public, as heretofore stated, from fraud and imposition." There was no sufficient reason for safeguarding the interests of the partners as between themselves, as there was for protecting the general public against deception, imposition, and fraud, so easly practiced, when it is kept in ignorance of the essential facts enumerated in the statute. Granting that the case may come within the letter of the law, it certainly is not within its meaning and palpable design. This assertion of title to property is not, therefore, met and answered by the rule that the law will not lend its aid in enforcing a claim founded on its own violation, as we have particularly stated, in *Marshall v. Dicks*, 175 N. C., 41; *McNeill v. R. R.*, 135 N. C., 733; *Vinegar Co. v. Hawn*, 149 N. C., 357. Nor must the plaintiff necessarily show a violation of the law in stating his cause of action or in proving it, as in *Liquor Co. v. Johnson*, 161 N. C., 76; *Wittkowsky v. Baruch*, 127 N. C., 313; *King v. Winants,* 71 N. C., 469.

It must be borne in mind that the business of this partnership was not, in itself, illegal, nor was the prosecution of it. The partners, on the contrary, were engaged in a perfectly legitimate and lawful enterprise. It seems impossible to suppose for a moment that the Legislature, sagacious as it is, and endowed in the highest degree with practical wisdom and practical common sense, would enact a statute, which would do so much evil and so little good as to a clearly innocent and harmless undertaking. The language must be exceedingly plain and unmistakable to lead us to such a conclusion. But we have a recent decision upon the subject, *Jennette v. Coppersmith*, 176 N. C., 82, in which this Court, in referring to and reviewing *Courtney v. Parker, supra,* said: "While the Court felt constrained to give this construction, on the ground, chiefly, that the act was a police regulation designed and intended to protect the general public from fraud and imposition, under such an interpretation the act is of such highly penal character that it should not be extended or held to include cases that do not come clearly within its provision."

In the *Jennette case* the firm name was "Jennette Bros. Co.," and the Court held that this was not an assumed name within the meaning of the statute, as would a purely fictitious name be. And more especially defining the words "assumed name," it was said by *Justice Hoke* to be one that "gives the impression of an act calculated to mislead or baffle inquiry," and further, that "the title of plaintiffs' firm, Jennette Bros. Company, being a partnership conducted under that name and style, giving as it did the true surname of its members, affording a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, should not be considered an 'assumed' name within the meaning and purpose of the law." And yet, in that case, the statute requirement that all the names be set forth fully in the certificate was not observed. But we return to the original proposition, that the transactions here were strictly between the partners, and the mischief intended to be corrected by the statute does not exist in this case, and a compliance with its provisions was not essential, as the statute does not and was not intended to apply, the transaction not being inherently wrong, or calculated to mislead, or to baffle inquiry by the public. The Legislature would hardly enact a police regulation to protect partners as between themselves, under the circumstances disclosed in this record.

Frequently a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. By some courts it is held that an agreement founded on or for the doing of such penalized act is void (9 Cyc., 476, and note 2); in accordance with the view of *Lord Holt,* in an old case: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibiting words in the statute." *Bartlett v. Vinor,* Carth., 251, 252. Other courts have held that if, for example, the penalty is imposed for the protection of the revenue, it may be presumed that the Legislature only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue. Others have regarded the question as one of legislative intent, and declared the proper rule to be that the courts will look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if from all these it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold and construe the statute accordingly. *Wheeler v. Hawkins,* 116 Ind., 515; *Dillon v. Allen,* 46 Iowa, 299; *Lindsey v. Rutherford,* 17 B. Mon., 245; *Coombs v. Emery,* 14 Me., 404; *Bowditch v. New England Mut. L. Ins. Co.,* 141 Mass., 292; *Lewis v. Welch,* 14 N. H., 294; *Ruckman v. Bergholz,* 37 N. J. L., 437; *Pratt v. Short,* 79 N. Y., 437; *Holt v. Green,* 73 Pa. St., 198; *Aiken v. Blaisdell,* 41 Vt., 655; *Neimeyer v. Wright,* 75 Va., 239 *Miller v. Ammon,* 145 U. S., 421; *St. Louis Nat. Bank v. Matthews,* 98 U. S., 621; *Barton v. Muir,* L. R., 6 P. C., 134.

As a general rule, a contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so, but it does not necessarily follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it. The question is in a great measure one of legislative intent, and its determination depends, as in other cases, on the construction of the statute. *Niemeyer v. Wright,* 75 Va., 239. Such was the conclusion of another court of high authority. *Harris v. Runnels,* 12 How. (U. S.), 79, which Court notes a distinction between statutes to raise revenue and those which are made for the protection of the public from moral evils, and those, which it is known by experience, society must be guarded from by preventive legislation. The Court, following *Baron Parke's* opinion in *Cope v. Rowlands,* 2 M. & W., 149, says: "A statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition. But it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That Legislatures do not think the rule one of universal obligation, or that upon grounds of public policy it should always be applied, is very certain. . . . It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

This Court has lately applied the rule we have just stated, and with reference to a similar question, arising out of the construction of a town ordinance requiring sewer connections to be made, in *Hines v. Norcott,* 176 N. C., 123, where it was said: "The case of *Courtney v. Parker,* 173 N. C., 479, does not conflict with our decision, and it is not an authority in support of the defendant's contention. There the defendant had done the very thing which was, in express terms or by the clearest implication, forbidden by the statute, and which it was unlawful to do, and every time he made a sale in the same manner he did the same thing which the statute was intended to prohibit, and which it declared should be unlawful and a misdemeanor, punishable by fine and imprisonment. In other words, the statute declared that he should conduct his business in a certain way, and not otherwise, and that he should not conduct it at all 'unless' he complied with the provisions of the statute. He did not pursue the prescribed method, but the one denounced, and his act was therefore held to be illegal, and his contract tainted by it. That is not our case. There is nothing in the lease transaction which is immoral *per se,* and therefore it is our right to search out the intention of the council and the meaning of the ordinance, in the language of the latter, and discover, if we can, what was its purpose, and not destroy contracts, with perhaps disastrous results, unless we find that to have been the real meaning and object in view. *Courtney v. Parker, supra,* and cases cited therein. The ordinance does not, in terms or by implication, forbid the sale or leasing of premises having no sewer connections, but is restricted to the injunction that in certain instances the owner should make such connections under a penalty for his failure to do so. There is no inhibition in this contract against the making of such connections, and the owner is perfectly free to make them at any time. There is not even a reference to the matter, one way or another." It will be observed that we there construed the ordinance, which is nothing but a local statute operating in restricted territory, and ascertained the intention of the governing body, in order to declare whether the lease in that case was in conflict with it, or contravened its provisions to such an extent, or in such a way, as to render it void and of no effect.

But the question as to the construction of this enactment comes under another rule, which is that statutes in derogation of common law, or common right, are construed strictly. Black on Interp. of Laws, 367, says: "It is a rule generally observed (except where prohibited by statute) that acts of the Legislature made in derogation of the common law will not be extended by construction; that is, the Legislature will not be presumed to intend innovations upon the common law, and its enactments will not be extended, in directions contrary to the common law, further than is indicated by the express terms of the law, or by fair and reasonable implications from its nature or purpose or the language employed." In regard to this doctrine, it is said in 36 Cyc., p. 1177: "As the common law forms the basis of the Anglo-Saxon system of jurisprudence, and furnishes the rule of decision except so far as it has been changed by statute, the common law in regard to a particular matter is presumed to be in force until it affirmatively appears that it has been abrogated or modified by statute. Therefore, except in those jurisdictions where the rule has been changed by express enactment, all statutes in derogation of the common law are to be construed strictly. Where the statute not only effects a change in the common law, but is also in derogation of common right, it must be construed with especial strictness. Examples of such statutes are those which operate in restraint of personal liberty or civil rights, or the use and enjoyment of public highways; which grant or enlarge special privileges; which grant power to deprive persons of the ownership of property without their consent; which impose restrictions upon the control, management, use, or alienation of private property; which disturb vested rights in property or contracts; or which restrain the freedom of contract, the exercise of any trade or occupation, or the conduct of business. The rule to be applied in the construction of all such statutes is that they must not be deemed to extinguish or restrain private rights, unless it appears by express words or plain implication that it was the intention of the Legislature to do so." The statute now under our consideration is clearly penal, as it makes a violation of its provisions indictable and punishable by fine or imprisonment. Finally, the very structure of the statute shows a clear intent not to include a case of this kind where there is no dealing in trade with any outsider, or with any one apt to be misled or defrauded, and especially does the proviso to section 1 manifest this purpose.

Coming to the last question presented by the case, that is, the estoppel of the order relating to the sale of the intestate's personal effects privately, instead of at public sale after posting the required notices. The application to sell privately did not involve the issue of ownership, but only the question whether it was wise or expedient that the administrator should be specially permitted to sell certain kinds of personal property mentioned in the statute (Rev., 64) at private sale for the reasons set forth in his application. There is no formal trial of the fact upon issues contemplated, as it is a question of fact, and the petition, while it describes the kind of property to be sold, as corn and oats, identifies it in no other way, except that the intestate owned some property of that general description, and he did, and property of that kind was actually sold. But it cannot be reasonably said that such an order estops the administrator to now assert that he owned individually an interest in the property sold. It can now consistently be claimed that the intestate had but an interest in the property sold, although it was sold as so much corn or oats. The sale of it in that way does not preclude the idea that he had only an interest in it, and that it was his share which was sold along with that of the administrator, the property being held jointly, and it being practically impossible, or, at least, inexpedient, to sell it otherwise. The question really involved in the proceeding, and the only one, was whether a sale made privately was better than one made publicly, as the property would bring a larger price. It is like the cases, where we have held, that the allegation, in a petition to sell lands for assets, of the existence of certain debts was not an estoppel, as to them or the amounts, the Court saying, in the case of *In re Gorham*, 177 N. C., 271, at p. 276, referring to and quoting from *Trust Co. v. Stone*, 176 N. C., 270, 272: "The judge held that the decrees were binding on the parties as to the amount of the debts as stated in the petition, but this was reversed on appeal, the Court saying: 'We do not concur with his Honor in the view taken by him of the question reserved, in respect to the effect of the decree giving the administratrix license to sell the land. That decree was an adjudication that it was necessary to sell, and is conclusive in favor of the title acquired by the purchaser, but it is not conclusive of the question of debt or no debt as against or in favor of creditors, or as against or in favor of the heirs.'" It is said in *Nobles v. Nobles*, 177 N. C., 243, at 247-248: "As a general rule, a judgment does not work an estoppel of record as between parties supposed to represent the same interest unless their rights and interests have been made the subject of inquiry and decision, nor in any event does an adversary judgment constitute an estoppel as to matters beyond the scope of the issues as presented and embraced in the pleadings," citing the following cases: *Weston v. Lumber Co.*, 162 N. C., 165; *Holloway v. Durham*, 176 N. C., 551; *Hobgood v. Hobgood*, 169 N. C., 485.

Two sorts of estoppel arise from the record of a judgment; first, from the record considered as a memorial or entry of the judgment; and, second, from the record considered as a judgment. As a memorial of the fact of the rendition of the judgment, the record imports absolute verity, and may be impeached by no one, whether or not a party to the proceeding in which it was made. As a judgment, on the other hand, the record had the further effect of precluding a reëxamination into the truth of the matters decided; but in this aspect it is, as a rule, binding only upon the parties to the proceeding and their privies. This further and secondary effect of the record considered as a judgment is otherwise known as estoppel by judgment, the matters adjudicated being termed *res judicata.* 16 Cyc., 685.

"Estoppel by judgment is a bar which precludes the parties to an action to relitigate, after final judgment, the same cause of action or ground of defense, or any fact determined by the judgment." 16 Cyc., 680.

In the application for a private sale, the only question was, Should a sale be made? and no question of the precise ownership was presented. There was no plea or answer raising it, and the point now in dispute was not then before the Court. Bigelow on Estoppel (6 Carter's Ed.), 42-43. As said in the cases cited above, it made no difference what property was sold. The order was to sell whatever property belonging to the intestate there was, and of the kind described, at private sale, and it did not adjudge that any particular property belonged to him, and if any, how much, as it was not necessary to do so. It therefore comes to this: that in order for there to be a bar, or an estoppel, under the principle of *res judicata,* arising out of a former judgment *in personam* between the same parties or their privies, "it is required that the court which rendered it should have 'cognizance of the class of cases to which it belongs, and should have acquired jurisdiction of the parties and of the subject-matter, and this question of jurisdiction of the subject-matter is determined by the controversy between the parties as presented and disclosed in their pleadings.' This position, so stated by *Chief Justice Beasley,* in *Munday v. Vail,* 34 N. J. L., 418, affirmed in *Dodd v. Una,* 40 N. J. Eq., 672, was approved and applied here in *Hobgood v. Hobgood,* 169 N. C., 485-91, and, recognizing this as the true test, it is held in numerous and well considered cases here and elsewhere that such a judgment will conclude the parties as to all matters directly in issue, and as to all matters within the 'scope of the pleadings which are material and relevant, and were in fact investigated and determined at the hearing. *Propst v. Caldwell,* 172 N. C., 594; *Cropsy v. Markham,* 171 N. C., 44; *Coltraine v. Laughlin,* 157 N. C., 282; *Gillam v. Edmonson,* 154 N. C., 127; *Tyler v. Capeheart,* 125 N. C., 64; *Jordan v. Farthing,* 117 N. C., 188; *Fayerweather v. Ritch,* 195 U. S., 277; *Aurora City v. West,* 74 U. S., 103. When, however, a court, going beyond the scope of the pleadings, undertakes to settle and determine matters entirely foreign to the controversy between the parties as they have presented it, the judgment, or that portion of it, does not bind, and may be treated as a nullity.' As held in *Munday v. Vail, supra,* 'A decree which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity even in a collateral proceeding.' And in illustration of the same principle it was held here, in *Gillam v. Edmonson, supra,* 'That an estoppel of record will bind parties and privies as to matters in issue between them, but it does not conclude as to matters not involved in the issues, nor when they claim in a different right.' " This was said by *Justice Hoke,* for the Court, in *Holloway v. Durham,* 176 N. C., 550.

The charge of the judge was free from any error. There was no expression of opinion by him, and the exception as to his statement of the contentions is futile, unless the error in it, if any, was called to his attention, so that it could be corrected. *S. v. Summers,* 173 N. C., 775; *S. v. Martin, ib.,* 808.

There was evidence to support the verdict, and a nonsuit would have been improper.

No error.

WILLIAM LONG v. U. S. FIDELITY AND GUARANTY CO. ET AL.

(Filed 12 November, 1919.)

1. **Equity—Mutual Mistake—Accounts—Settlement—Quantum of Proof—Rescission and Cancellation.**

   Where a settlement of a monetary demand is sought to be set aside, in equity, by the creditor as insufficient, on the ground of mutual mistake of the parties, it requires the plaintiff to show the mistake that would vitiate the settlement by the preponderance of the evidence; but to correct and enforce an instrument as corrected requires the evidence to be clear, cogent, and convincing, for it calls upon the chancellor to exercise a much greater degree of power.

2. **Equity—Account—Settlement—Mutual Mistake—Cancellation.**

   Where a debtor has obtained a receipt in full from his creditor, upon payment of a less sum than was due him, by mutual mistake induced by the creditor's, or his agent's, misrepresentation, intentional or otherwise, a correction of the written receipt will not afford adequate relief, and equity may cancel the instrument and restore the parties to their original rights.

3. **Contracts—Debtor and Creditor—Settlement—Payment—Agreement—Evidence—Trials.**

   A subcontractor had a working agreement with his contractor with reference to several buildings the latter was erecting, that payments made the subcontractor were to be received and applied by him to any of the several jobs, and accounted for in the final settlement. The contractor failed, and the subcontractor sued the surety on his bond for the balance due him on one of these buildings, the "S. Hotel." Some of the checks given by the contractor had the entry, "S. contr.," or "S. Hotel," which the plaintiff claimed should be applied to the other buildings, but defendant claimed should be deducted from the amount due on the "S. Hotel," for which alone it was responsible, and to that extent reduce its liability. *Held,* evidence as to the working plan for credits of payments, agreed to before the issuance of the checks mentioned, was competent, and the charge of the court thereon was proper.

Civil action, tried before *Lane, J.,* at March Term, 1919, of Guilford.

The action was brought to recover the sum of $2,016.03, less $800, alleged to be due the plaintiff for work and labor done and materials furnished in the construction of a hotel building, at Spartanburg, S. C., the contractors, Longest & Tessier, having sublet a part of their contract, viz., the plastering, to the plaintiff. Longest & Tessier failed in business, and were adjudged bankrupts on 25 May, 1917. They were to furnish all labor and material required to perform the contract, as to furnishing labor and material, and, in order to secure their compliance therewith, they gave the usual bond with the defendant as surety. The parties proposed to settle their controversy and met for the purpose, and entered into a settlement, after which the $800 was paid.

The plaintiff further alleged:

1. That he was employed by the said Longest & Tessier Company to do the plastering in said hotel building, and furnish labor and material therefor, and that, under said contract of employment, he did furnish material and labor, and did plaster said hotel, to the amount of $13,555.53, upon which amount there has been paid $11,539.50, leaving a balance due upon said contract for labor done and material furnished prior to the next payment hereinafter referred to of $2,016.03.

2. On or about 7 November, 1917, the defendant stated and represented to the plaintiff that the said sum of $2,016.03 due, as aforesaid, upon the Spartanburg contract, was, as a matter of fact, due to the plaintiff upon a contract entered into between the plaintiff and Longest & Tessier Company to erect a building at Radford, Va., and the defendant, the United States Fidelity and Guaranty Company, having access to said books, which plaintiff did not have, represented to the plaintiff that the books of Longest & Tessier Company showed that the statements made, as aforesaid, were true, and said defendant stated and represented to plaintiff that not more than $800 was due to him on the Spartanburg contract, and the balance was due on the Radford contract, and defendant offered to pay the plaintiff $800 if he would sign a receipt in full for all amounts due upon the Spartanburg contract, representing at the time that this was all that was due the plaintiff upon said contract; that the plaintiff thereupon, relying upon said representations, gave to

the said defendant a receipt in full for all amounts due the plaintiff on account of the Spartanburg contract, and also assigned to the defendant all his claim for compensation for the work done under the Spartanburg contract.

3. That the said settlement was obtained from the plaintiff either by mutual mistake or by false and fraudulent representations, and the plaintiff asks that the same be set aside and held for naught, but the plaintiff admits that the said defendant is entitled to an additional credit for the said sum of $800 received by him, as aforesaid, leaving as the amount due under said contract from the defendants $1,216.03.

The defendant denied the material allegations of the complaint, especially denying that $2,016.03 was due on the Spartanburg contract, and averred that, according to the books of Longest & Tessier, the sum of only $639.19 was due thereon. It admitted payment of the $800, and the execution of the receipt by plaintiff and the assignment of his claim to the defendant. Defendant, by separate allegations, goes much into detail as to the occurrences during the conference had for a settlement, which we need not set out here. The jury found that there was a settlement, which was brought about by mutual mistake.

Judgment for the plaintiff, and appeal by defendant.

S. B. Adams, R. C. Strudwick, and Allen Adams for plaintiff.
John L. Rendleman and Justice & Broadhurst for defendant.

WALKER, J., after stating the facts as above: The gist of the controversy is that, as plaintiff alleges and contends, the settlement, receipt, and assignment were obtained, if not by fraud, then by mutual mistake of the parties. The issue as to the fraud was withdrawn, leaving only the issues as to the settlement, the mutual mistake and the damages. There was ample evidence to support the verdict, and the motion for a nonsuit was properly overruled.

Two questions remain for consideration, first, whether the judge should have given a different instruction in regard to the quantum or degree of proof, and instead of charging that the burden was upon the plaintiff to satisfy the jury of the mutual mistake by a preponderance of the evidence, he should have told them that it must be done by clear, strong, and convincing proof. This is a misconception of the nature of the action and the issue. The plaintiff did not seek to reform or correct the settlement, but to set it aside entirely, so that the parties would be placed *in statu quo*, and in the latter case only a preponderance of the evidence is required. The distinction is based upon a sound reason. There is a difference between cancellation or rescission and reformation of an instrument. A noted text-writer says that courts of equity do not grant the high remedy of reformation upon a probability, or even upon a mere preponderance of evidence, but only upon a certainty of error. Pomeroy on Eq. Jur., sec. 859. It is not so with us in regard to cancellation or rescission (*Perry v. Ins. Co.*, 137 N. C., 402; *Poe v. Smith*, 172 N. C., 67), though it seems to be so in some other jurisdictions not necessary to mention. A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution; and, also, must be able to show exactly and precisely the form to which the deed ought to have been brought, and that the omission of some material thing was caused by their mistake. To reform a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual. 34 Cyc., at p. 917, note; *Coppes v. Keystone Paint, etc., Co.*, 36 Pa. Super. Ct., 38. This expresses the distinction between the two equities, and explains sufficiently why there should be a difference in the measure of proof. Where there is reformation, we not only correct the deed, contract or settlement as written, but compel performance of it, or enforce it, in its amended form. In the other case, we put it out of the way and restore the parties to their former position. This distinction is fully discussed in *Harding v. Long*, 103 N. C., at p. 1; *Avery v. Stewart*, 136 N. C., 426; *Glenn v. Glenn*, 169 N. C., 729; *Lehew v. Hewett*, 138 N. C., 6; *Lamb v. Perry*, 169 N. C., 436; *Ray v. Patterson*, 170 N. C., 226; *Perry v. Ins. Co., supra*, and *Poe v. Smith, supra*; *Boone v. Lee*, 175 N. C., 383. That a court administering equitable principles may set aside a deed, contract, or other instrument, in a proper case, where it is based upon an error of fact, or sometimes for mutual mistake, or the mistake of one party induced by the fraud of another, instead of reforming it, has been settled by authority. Bispham on Equity (9 ed.), secs. 31 and 372, at p. 472. Sometimes adequate relief cannot be granted without pursuing this course. Bispham on Equity, sec. 190, pp. 325, 326, says: "On the other hand, when there is a settlement of accounts made between parties which correctly expresses their intention, but which is founded on error, the settlement will be set aside," citing Adams Eq., 384, and numerous cases in note 1; 34 Cyc., 918; *Stuart v. Sears*, 119 Mass., 143. The written agreement by which the settlement was evidenced could not well be reformed and afford full and adequate relief, but this must be done by cancellation of the instrument and rescission of the contract of compromise and settlement, which was entered into by ignorance and mistake as to the true facts, induced by the positive representation of the defendant's agent, albeit that it was made without fraud, and by the inadvertence and mistake of the agent. By its own conduct, for that of the agent is imputed to it, the defendant has induced the plaintiff to a course of action which will greatly prejudice him, if it is not reversed, he being without any fault, but being misled as to material facts by the agent's assertion in respect to them.

Coming to the other question, we do not see why the parties could not agree upon, or establish a custom of dealing with each other, as to the application of the payments made by the contractors to the subcontractor—the plaintiff.

As to the four checks, aggregating $1,050, on each of which was the entry, "Spartanburg Contr." or "Spartanburg Hotel," indicating some connection between them and the Spartanburg contract, the evidence is that there was an agreement from the first between the contractors, Long & Tessier, and their subcontractor, William Long, that, without regard to any such entries, the payee in the checks might apply their proceeds, when collected, to any one of the accounts, there being several, the Spartanburg, the Radford, and others, or to general account, and the question as to how the application should be made to one account or another was not to be finally determined, until the settlement, and that this agreement and custom were in force at the time these checks were given. This, therefore, is not the ordinary case of a check being given, it being expressed on its face to be in full settlement, or that it should be applied to a particular account without more. *Kerr v. Saunders,* 122 N. C., 635; *Aydlett v. Brown,* 153 N. C., 334, and *Rosser v. Bynum,* 168 N. C., 340, and cases cited. Our case falls more nearly within the principle stated in *Rosser v. Bynum, supra.* In the other cases cited the entry was explicit, and its meaning unmistakable, but in the *Rosser case,* where the entry was not so clear as to its meaning, it being "Lbr. to date," parol evidence was held to be admissible for the purpose of showing its meaning and effect, or how the parties understood it. Referring to the cases there cited, it is said: "A proper consideration of these and other cases on the subject will disclose that such a settlement is referred to the principles of accord and satisfaction, and unless the language and the effect of it is clear and explicit, it is usually a question of intent, to be determined by the jury. On perusal of the record, we do not find that any dispute had arisen between the parties when the check was given, and, applying the doctrine as stated, we do not think the words, if they were on the check when received, are sufficiently definite or conclusive to be allowed the effect given them by his Honor, and that the question should be referred to the jury as to the intent of such an entry, and we must hold that there was error in the charge in reference to the testimony bearing on this matter." There is no definite instruction, on the face of the checks, that they should be applied to the Spartanburg account, but a mere memorandum, which may mean that or something else, and which is capable of explanation. At any rate, it was competent to show that there was a subsisting agreement concerning the matter, or a working arrangement, under which the plaintiff was at perfect liberty to apply the proceeds of the checks, when collected, to open account, if he chose to do so. Whether there was such an agreement was a question solely for the decision of the jury, and by the verdict, charge, and evidence it appears that they accepted the plaintiff's version as the correct one. J. N. Longest, one of the contractors, testified: "When we settled with William Long he was charged with all the money we had advanced to him and given credit for all the work he had done on all the contracts, and the general balance would be the same. That is, if he had credited it on one job and we on another, in the final settlement that was all adjusted. The apparent discrepancy between the books and this statement, which shows two thousand odd dollars due, arose from the fact that we had not had an opportunity, before the bankruptcy took place, to have a general settlement with William Long. In my judgment, if we had been able to settle with William Long, the books and statements would have shown that we owed him on the Spartanburg job some $2,000. The statement referred to, and marked Exhibit 'B' for identification, was made up by our bookkeeper, Miss Lowe. That exhibits a correct statement between our company and William Long on the Spartanburg contract. It shows a balance due of $2,016.03." Longest told the plaintiff, on 12 May, 1917, that the balance due him on the Spartanburg job was $2,016.03, which plaintiff claimed to be the true amount, and on 6 March the bookkeeper, Miss Lowe, gave the plaintiff a written statement of account, showing the balance to be $2,016.03, and Tessier admitted that she was wrong when she charged the money to the Spartanburg contract--it should have been charged to the Radford contract. While the language of the charge may not have been very apt to describe precisely the agreement as to the application of the money, it was sufficiently so to show that the jury must have understood the matter, and that the plaintiff was fully authorized to make the application as he did. In such cases, the law looks to the intention of the parties. As said in 30 Cyc., p. 1240: "Payments by the debtor will be applied according to the intention of the parties where that can be determined with reasonable certainty." The position of the defendant as to the law is correct, that if an application of payment had been made it could not be revoked without the consent of the surety, as his rights could not be prejudiced, or impaired, without his acquiescence, or against his protest. 30 Cyc., 1250, 1251, and 1252, especially; *Davis v. Lassiter*, 112 N. C., 128; *Miller v. Montgomery,* 31 Ill., 350. *Chief Justice Ruffin* stated the principle very clearly in *Nelson v. Williams,* 22 N. C., at p. 120, where he said: "As soon as such a security is created, and by whatever means, the surety's interest in it arises; and the creditor cannot himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest. He is bound not to do it. A security stands upon the same footing with a payment. If the principal direct the fund to be applied to the payment of a debt for which the surety is bound, the creditor cannot, for his own advantage, change the application to another debt. As respects the surety, the debt is paid." But the doctrine does not apply to the special facts of our case.

Our conclusion is:

First. That the charge as to the burden and degree of proof was correct, for the plaintiff did not seek to correct the settlement, but to set aside or cancel it.

Second. That the instruction in regard to the checks was without any error, as there was some evidence of authority in the plaintiff to make the application as he did, it having been done in accordance with the usual manner of conducting the business, and, under an agreement, giving him such power, which was made before the money was paid by the contractors to him.

Before taking leave of the case, we deem it proper and just to state that the evidence fully satisfies us there was absolutely no ground upon which to base an allegation of fraud or bad faith on the part of defendants' attorney, but, on the contrary, it appears very clearly to us that he acted in perfect good faith, and with the utmost frankness, and that the error resulted from the bookkeeping of the contractors, which misled him as to the true balance due on the Spartanburg contract. If the checks had been credited on that account, the balance, as stated by him, would have been approximately correct.

No error.

S. H. LEA v. SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 19 November, 1919.)

Negligence—Issues—Contributory Negligence—Last Clear Chance—Burden of Proof—Trials—Instructions—Appeal and Error.

Where, in an action to recover damages for a personal injury, the three issue of negligence, contributory negligence, and the last clear chance are involved, the burden is upon the plaintiff to show negligence and proximate cause under the first issue; and when this has been done, the burden is on the defendant to show plaintiff's contributory negligence under the second issue, and, under the third issue, the burden then shifts to the plaintiff to show that, notwithstanding his own negligence, the exercise by the defendant of ordinary care would have avoided the injury: and where the judge's charge applies the evidence so as to increase the burden on the first issue, and thereby unduly places a greater burden upon the plaintiff than the law requires, it is reversible error.

CIVIL ACTION, tried before *Adams, J.*, at April Term, 1919, of MECKLENBURG.

This is the third time we have had this case before us. It is reported in 175 N. C., p. 459, and 176 N. C., p. 811. The facts are substantially stated in the first appeal, reported in 175 N. C., 459. The error assigned in this appeal is like that, for which we gave a new trial in the second appeal, though it was at the last trial an error against the plaintiff instead of against the defendant in the second appeal. The issues are alike in all the appeals.

The principal errors assigned in this record are those taken to two instructions of the court, which we will designate by numbers:

1. "If you find from the evidence that the plaintiff drove his horse across the track of the railway when he saw the car approaching him, and thereby took the chance of his ability to pass over the track in safety, and that a man of ordinary prudence and care would not have attempted to do so under the same or similar circumstances, and drove his wheel upon the fender of the car and was thereby injured, plaintiff, under these circumstances, would be deemed to be guilty of such negligence as, nothing else appearing, would bar his recovery as the proximate or concurring cause of his injury, and, in that event, you would answer the first issue 'No.'

2. "If you find the facts to be that the collision between the buggy and the street car broke the harness so that the only connection between the horse and buggy was the plaintiff's holding on to the reins, and that therefore the horse ran away, and the plaintiff negligently continued to hold to the reins until he was pulled over the dashboard, and on account thereof he received the injuries of which he complains, and if you further find that his negligence in this respect was the sole proximate cause of his injury, you will answer the first issue 'No.'"

The plaintiff's objection to the first of these instructions is based upon two grounds:

(1) It places the burden on the plaintiff of proving that he was not guilty of contributory negligence, and not upon the defendant, whose burden it was to prove that he was guilty of negligence.

(2) It permitted the jury to answer the first issue "No," without even considering the alleged negligence of the defendant.

Judgment for defendant, and appeal by plaintiff.

Thomas W. Alexander and Cansler & Cansler for plaintiff.
Osborne, Cocke & Robinson for defendant.

WALKER, J., after stating the facts: The burden was upon the plaintiff to satisfy the jury upon the first issue that the defendant was negligent, and that its negligence was the proximate cause of the injury to him. This was his only burden. When he had established the defendant's negligence as the proximate cause of his injuries, the burden then shifted to the defendant, and it was required to prove, under the second issue, the plaintiff's contributory negligence. When it has done that, the burden again shifts, but this time to the plaintiff, and he must show that under the third issue, notwithstanding plaintiff's negligence, the defendant could, by the exercise of ordinary care, have prevented the injury to him. The first of the instructions given by the court violated this rule, because it placed the burden on the plaintiff upon the first issue to disprove his own negligence, whereas, his burden was to show merely the defendant's negligence as the proximate cause of the injury. The burden thus placed on the plaintiff did not properly belong to him, and his own negligence was not involved in the first issue, but only the defendant's negligence, and the question whether it was the proximate cause of plaintiff's injury. The jury, under this instruction, could well have answered the first issue "No," without considering the question really presented by it, namely, whether the defendant had caused such injury by its negligence. But, even if the judge had once properly instructed the jury on the first issue, this second instruction thereon would have been error, as being wrong in itself, and as leaving the jury in doubt as to the correct law. *Tillett v. R. R.,* 115 N. C., 663; *Williams v. Haid,* 118 N. C., 481; *Edwards v. R. R.,* 132 N. C., 99, at p. 101. The case of *Peoples v. R. R.,* 137 N. C., 96, at p. 97, seems to be directly in point, as to the incorrectness of this instruction. There the defendant requested the court to charge, in substance, that it was the duty of the plaintiff's intestate to keep a sharp lookout for the string of cars, which was being "kicked" along one of the tracks in the defendant's yards, and that if he failed to do so, the answer to the *first* issue should be "No." This Court, in reviewing the case, said: "This was properly refused, because the prayer assumed as a fact that intestate's failure to keep a sharp lookout was the proximate cause of the injury. Besides, this prayer was upon the first issue and seeks to throw upon the plaintiff the burden of proving, not that the defendant was guilty of negligence, but that the intestate was not guilty of contributory negligence. Such instruction would have been clearly erroneous, if given, citing *Fulp v. R. R.,* 120 N. C., 525, which sustains its ruling. See, also, *Curtis v. R. R.,* 130 N. C., 437; *Cox v. R. R.,* 123 N. C., 604; *Graves v. R. R.,* 136 N. C., 9. It was said in *Cox v. R. R., supra:* "Each issue bears its own burden, and it rarely happens that the burden of all the issues rests upon the same party, for in cases of negligence, like the present, it changes with each successive step, it being necessary for the plaintiff to prove the negligence of the defendant; the defendant, the contributory negligence of the plaintiff; and, again, for the plaintiff to show the last clear chance of the defendant, if that issue becomes material. Each of these issues depends upon the one preceding. The plaintiff must first prove that he was injured by the negligence of the defendant. If he fails to prove it, that is an end of the case. The defendant is not required to prove contributory negligence unless there is negligence on the part of the defendant." And we may add that plaintiff is not required, on the first issue, to show the absence of negligence on his part, the full burden of showing his negligence resting upon the defendant under the second issue, and by the statute, Laws 1887, ch. 33 (Rev., 483). That law provides that contributory negligence shall be specially pleaded as a defense, "and proved by the defendant on the trial." It will be observed that the judge directed the jury to answer the first issue "No," upon a finding that plaintiff had been negligent in the respect mentioned by him. This was making the answer to the first issue depend upon the plaintiff's negligence instead of upon that of the defendant, which amounted not only to placing the burden improperly, but also inserted in an instruction on the first issue matter not germane to it, and not pertinent to that issue, but to be considered only on the second issue.

There was evidence in this case sufficient to carry it to the jury. *Wheeler v. Gibbon*, 126 N. C., 811; *Moore v. R. R.*, 128 N. C., 457; *Norman v. R. R.*, 167 N. C., 543; *Ingle v. Power Co.*, 172 N. C., 751; *Smith v. Electric Co.*, 173 N. C., 489; *Sparger v. Public Service Co.*, 174 N. C., 776. It was for the jury to decide, under proper instructions from the court, which party's negligence was the proximate cause of the injury, with the burden upon the plaintiff as to the first and third issues, and upon the defendant as to the second. In *Stewart v. R. R.*, 137 N. C., 690, 691, after stating that the statute requires the defendant to allege and prove contributory negligence, the Court said: "It was error to put upon the plaintiff the burden of proving that her intestate was not negligent." See, also, *Hardy v. Lumber Co.*, 160 N. C., 113; *Kearney v. R. R.*, 177 N. C., 251, 253.

We are sure the learned judge gave this instruction inadvertently, or that the necessary effect of it was not, at the time, apparent to him.

The second of the instructions to which exception was taken is subject to the same criticism. It was given on the wrong issue. It was suggested, on the argument, as to this instruction, that perhaps it was properly applicable to the measure of damages, because the injury in a legal sense was complete when the collision took place, and what happened afterwards, although in continued sequence, was merely an aggravation of the original damage, and should not have been dealt with under the head of negligence. It was further suggested that the case, in this aspect of it, bore some resemblance to, if not governed by, *Blaylock v. R. R.*, decided at this term. Whether this be so or not, we need not consider, as there was error in the charge upon the first issue, for which the judgment must be reversed. It makes no difference how often a case has been tried, if there is error it must be sent back to another jury until it is so tried, at last, as to be free from error.

We are convinced that there was substantial error, and the verdict may have been, and probably was, the result of it.

New trial.

W. S. ALLEN ET AL. v. TOWN OF REIDSVILLE ET AL.

(Filed 26 November, 1919.)

1. **Municipal Corporations—Cities and Towns—Elections—Injunctions—Appeal and Error.**

Where an election has been held according to law to vote upon the question of the city selling one of its public utilities, a restraining order theretofore sought to prevent the holding of the election, presents a moot question that the Supreme Court will not decide on appeal, there being then nothing for the judgment to operate on.

2. **Elections—Fraud—Municipal Corporations—Cities and Towns—Sales—Public Utilities—Injunctions—Contracts.**

Where the municipal authorities had agreed to sell one of the public utilities of the city, subject to the approval of the vote of its electors, and thereupon a suit to restrain the election is instituted, alleging fraud in the contract, and thereafter the question is approved by the voters: *Held*, the allegations of fraud cannot be maintained, for at that time the proposed contract had not been entered into, and the making of the contract thereafter upon the approval of the voters cannot affect the matter, as it would make the action a new one.

3. **Appeal and Error—Exceptions Abandoned—Briefs.**

An exception not referred in the brief is considered as abandoned on appeal. Rule 34.

4. **Appeal and Error—Injunctions—Fraud—Findings.**

Where matters of fraud alleged as the basis of an application for an injunction are denied by the answer, and there is a finding by the judge, acquiesced in by the plaintiff, that there was no fraud, this question will not be considered on appeal.

5. **Municipal Corporations—Cities and Towns—Public Utilities—Sales—Admissions—Trials—Consideration—Fraud.**

In an action wherein an injunction is sought against the private sale of a public utility by the city authorities, on the ground that the purchaser was to pay only thirty thousand dollars for it when another offered fifty thousand dollars, the sale will not be declared void for an admitted insufficient consideration, when other allegations of the defendants set forth such facts as would show that the citizens or the business interests of the city would be equally or more benefited if sold to the one with whom they had agreed.

6. **Elections—Ballots—Related Questions—Municipal Corporations—Cities and Towns—Public Utilities—Sales—Franchise.**

The question of a sale of a public utility to a certain corporation, and the granting to it of a franchise necessary to its continued operation, if submitted upon one ballot, are questions closely related to each other, and the ballot would not be objectionable on the ground that a vote thereon would deprive the voter of his choice as to one of the propositions. In this action it is admitted that only the one proposition as to the sale was submitted.

7. **Statutes—Interpretation—Legislative Purpose.**

Statutes relating to the same subject-matter should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the Legislature may be considered in the effort to ascertain the uniform and consistent purpose of the Legislature.

8. **Same—Municipal Corporations—Cities and Towns—Public Utilities—Public Outcry—Private Sales—Vote of People.**

Before the enactment of our statute, now Rev., 2916 (6), our courts had interpreted our statute, now Rev., 2978, requiring a sale at public outcry by municipal authorities, as not including public utilities such as parks, markets, city halls, waterworks, lighting plants, etc., held for the use of the public, and said sec. 2916 (6) was thereafter enacted, requiring that such public utilities, excluded by sec. 2978, should be submitted to the voters of the municipality, and it is *Held*, that these two statutes are harmonious, and reconcilable, and that under the provisions of sec. 2916 (6) it is not required that a sale of public utilities, held in trust for the citizens, and approved by the voters, be made at public outcry to the highest bidder, but may be sold privately, which, in this case, is particularly emphasized by the charter of the city in question.

9. **Monopoly—Evidence—Injunction.**

In this cause to restrain a private sale of a public utilities by the city authorities to an electrical power plant with a grant of a municipal franchise, there is no evidence that the purchaser would acquire a monopoly.

CLARK, C. J., dissenting.

APPEAL by plaintiffs from *Bryson, J.*, at the June Term, 1919, of ROCKINGHAM.

This is an action brought by two citizens and taxpayers of the town of Reidsville against the town of Reidsville, and the mayor and members of the board of commissioners of said town, and the Southern Public

Utilities Company to restrain the holding of an election called for the purpose of approving or disapproving the sale of the electric light plant of Reidsville to the utilities company.

The plaintiffs allege, in substance, the ownership of the electric light plant by the town of Reidsville; that the utilities company is a subsidiary corporation of the Southern Power Company, and that these two companies and the American Tobacco Company have stockholders in common; that the defendants, may and board of commissioners, were elected in May, 1917, and that the American Tobacco Company, through its agents and employees, was active in securing their election; that the said mayor and commissioners were nominated at the dictation and instance of the American Tobacco Company, and were elected in large measure by its influence, exerted through its officers, agents, and employees, about one hundred and fifty-five of whom were voters in said election; that prior to the election the said defendants, together with the said utilities company, began to conspire and collude together for the purpose of effecting a transfer of said light company and property to the utilities company at a gross and fraudulent undervaluation; that the defendants refused to furnish prospective bidders for the said property any definite or adequate information as to what property they proposed to sell, and what obligation, if any, they desired the purchasers to assume, and that they evaded advertising competitive bids in any adequate manner; that at a meeting of the defendant board of commissioners on 14 August, 1917, Frank Talbert and his associates, all reputable parties, submitted a written proposal for the purchase of said property at a price of $50,000; that notwithstanding the fact that the bid of Talbert and his associates was for $20,000 more than the offer of the utilities company, the defendants accepted the proposition of the utilities company to buy said plant for $30,000; that the terms on which Talbert and his associates agreed to buy said property, and the obligations they agreed to assume, were more favorable to the town of Reidsville and its citizens than those contained in the offer of the utilities company; that the action of the defendants was without any valid reason or excuse, and was arbitrary, unjust, and due to partiality to the untilities company and its allied corporations, and in disregard of the rights of the plaintiffs and other citizens and taxpayers; that on 11 September, 1917, the defendants ordered an election to be held on 23 October, 1917, for the purpose of enabling the citizens of Reidsville to vote upon and approve or reject the said proposition of the utilities company; that the service rendered by the utilities company to the public for several years had been unreliable and unsatisfactory; that the said contract with the utilities company, under the circumstances and conditions alleged, is a fraud upon the town of Reidsville and its citizens, as well as upon the rights of the plaintiffs;

that said contract attempted to be made is fraudulent and void, and if submitted by said mayor and board of commissioners to the voters at an election, will subject the town to needless and unnecessary expense; that if the defendants are allowed to proceed and consummate their scheme of selling the said property and granting a franchise to the utilities company, the plaintiffs will be irreparably damaged, and they demand judgment that a restraining order be issued to prevent the holding of said election, and that the action of the defendants in attempting to sell said property be decreed to be fraudulent and void, and that the same be set aside, and for a permanent injunction.

A temporary restraining order was issued upon motion of the plaintiffs, returnable before *Judge Harding* on 20 October, 1917.

The defendants filed answers in which all of the allegations of fraud, collusion, and improper conduct were specifically denied.

The defendants further allege that the town of Reidsville is largely a manufacturing community, particularly interested in the manufacture of the products of leaf tobacco, its prosperity and growth being dependent to a large extent upon such enterprises, its payroll of 1 January, 1917, being about $8,000 per week; that for the successful operation and enlargement of the different manufacturing enterprises, it was necessary to have a much larger quantity of electric power than was obtainable from the plant owned by the town of Reidsville; that in order to meet this demand and need for increased power, the Reidsville Commercial and Agricultural Association was formed; that this was a voluntary association of practically all of the business men of the community, which is now supported by the public revenue by authority of the General Assembly; that this association took up the question of the necessity of increasing the supply of electric power; that shortly before this, the Southern Power Company had built a transmission line to Spray and Draper which passed near Reidsville, making available for the first time to the town of Reidsville the only source of hydro-electric power in this section of the State; that in considering the power question, the said association appointed committees to look into the matter to make available to the town the hydro-electric power of the Southern Power Company; that on 3 August, 1915, at a meeting of the directors of said association, together with representative citizens of the town, the manner and means of increasing the electric power was considered; that about a year thereafter the F. R. Penn branch of the American Tobacco Company, which had been engaged in the manufacture of tobacco in Reidsville for a number of years, expressed a desire to make a large addition to its existing plant, provided the necessary hydro-electric power could be obtained, which increased demand for power was equal to or in excess of the capacity of the electric power which the plant of the town of

Reidsville was able to furnish, and that this addition to the plant of the Penn Company would increase the payroll of the town of Reidsville $10,000 per week; that the plant of the town of Reidsville has the capacity of some two hundred and twenty-five horse-power, which was totally inadequate for the needs of the town, its citizens, and various enterprises; that under these conditions there was a division of opinion as to whether it was best to sell the plant or to purchase the necessary power from the Southern Power Company; that upon investigation it developed that in order to buy the power of the Southern Power Company for sale and distribution it would be necessary for the town to install and equip a transformer at a cost of approximately $30,000; that these matters continued to be the subject of discussion and agitation, not only among the members of the board of commissioners, but upon the streets of the town and the local newspapers, until finally it became the controlling and decisive issue in the election of May, 1917, at which the present board of commissioners and mayor were elected, the issue being whether the town should retain its plant, build the transformer station, and secure the power of the Southern Power Company for sale and distribution, or whether it should sell its plant and grant a franchise to the Southern Public Utilities Company and let that company supply the needed power, and upon this issue the present board of commissioners and mayor were elected by a majority of one hundred and sixty-nine votes; that the R. P. Richardson, Jr., Company is engaged in the manufacture of tobacco in the town of Reidsville, and that they will have serious competition in the purchase of its leaf supply as well as in the employment of labor in the event the manufacturing enterprises of the town are substantially increased, especially will the addition of the Penn factory tend to produce this effect, and as the defendants are advised and believe, the president of the company, and one of its largest stockholders, R. P. Richardson, has a selfish interest in retaining the existing conditions of labor and tobacco; that the said Richardson has been the chief actor in opposing the plan proposed by the said board of commissioners and in submitting the proposition of the said Talbert and his associates, which these defendants allege was not made in good faith.

That in passing upon the merits of the two propositions, and in declining the proposition of the plaintiffs and accepting the proposition of the Southern Public Utilities Company, they were influenced, in addition to the matters and things hereinbefore set out by the following reasons:

1. That they are advised and believed, and still believe, that the proposition accepted was better for the town of Reidsville and its various industries, and especially so for that it would insure a more continuous, reliable, and ample supply of power at a cheaper rate.

2. That the proposition of the plaintiffs was signed by a number of individuals and one corporation. Only one of said individuals so signing being a resident of the State of North Carolina, and he was known to the defendants to possess limited means. That the local corporation signing same was a tobacco company, chartered in the State of New Jersey, and as defendants were advised and believe, said corporation had no charter power to engage in the business of furnishing light and power as proposed, and the proposition itself expressly stated that if accepted, they would organize themselves into a corporation without indicating the amount of proposed capital stock or financial responsibility of the contemplated corporation.

3. That these defendants did not then, and do not now, believe that the proposition to the plaintiffs was submitted in good faith with a view to have same approved by the people at an election, if accepted, and they were confirmed in this belief by the statement of R. P. Richardson, chief actor and moving spirit in same, made at the time of submitting the proposition, that if they accepted his proposition he would oppose the approval thereof by the people at an election to be held for that purpose.

4. That the bidders stated, in submitting their proposition, that if the same was accepted and approved at an election that it would require twelve months thereafter to install the necessary machinery and appliances, and owing to existing war conditions, these defendants did not believe that they would be able to purchase and install the machinery even in that time. Whereas, the Southern Public Utilities Company stipulated and agreed, if awarded the contract, to install and begin furnishing power within ninety days.

5. That the bidders' proposition contemplated installing a large steam plant, the operation of which would be dependent solely upon the use of coal, and no auxiliary plant to supply light and power in case of accident, break-down, or interference of the main plant; whereas, the Southern Public Utilities Company stipulated to furnish hydro-electric power, and also to maintain an auxiliary steam plant; that the element of uncertainty in obtaining continuous power and light generated solely from coal was emphasized by the fact that these defendants have not been able to secure coal from the mines sufficient, at all times, to operate this present small plant, occasioned by the interruption of railroad facilities in handling coal since this country entered the war.

6. That the controlling issue in the campaign at which these defendants were elected was as to whether or not the town of Reidsville should sell its plant to the Southern Public Utilities Company and contract with them for hydro-electric power; that the merits of this proposition were discussed in public meetings among the people before the election, and some of the plaintiffs made public speeches advising the people against

the election of the present board of commissioners to prevent said sale and contract. That the voters overwhelmingly elected the present board upon that issue, and with this mandate fresh from the electorate, these defendants, as the chosen servants of the people, took up and negotiated in good faith with the Southern Public Utilities Company the contract and sale referred to. That after careful, honest, and faithful consideration of the matter, they sold said plant and property to, and made a contract with, the Southern Public Utilities Company, subject to the approval thereof by the people in accordance with subsection 6 of section 2916 of the Revisal, as amended by the acts of 1917.

7. That these defendants were and are in no wise interested in the personal animosity existing in the mind of the president of the R. P. Richardson, Jr., & Company, Inc., against the American Tobacco Company, arising out of the fact that they are and have been in the past business rivals, but were desirous of encouraging the development of all manufacturies, and furnishing of all necessary power for their operation, and the consequent increased demand for a larger number of employees at good wages.

The Public Utilities Company filed a separate answer, which is substantially as hereinbefore set forth, except that in addition thereto it stated that it did not desire to go into a community where there was a division of sentiment, and offered to cancel and rescind the said proposition to sell said plant to it, and it renewed this offer in this court.

Affidavits were filed in behalf of the plaintiffs and the defendants, and at the hearing before *Judge Harding* on 20 October, 1917, the restraining order theretofore issued was dissolved, and among other things he finds in said order that "the court is of the opinion, and so finds, the facts that there is no evidence of any corruption or fraud on the part of the defendants in entering into the contract set out in the pleading or in calling and ordering an election for the ratification of the contract by the said voting citizens of the town of Reidsville."

The plaintiffs excepted to this order, and gave notice of an appeal to the Supreme Court, but the appeal was abandoned.

The election was held on 23 October, 1917, and resulted in an approval by the voters of the sale to the utilities company, there being three hundred and ninety-two votes cast in favor of said sale and sixty-eight votes against it.

The cause again came on for hearing at June Term, 1919, and the plaintiffs then made the following admissions:

"It is admitted by the plaintiffs that an election was duly called, at which election there was submitted to the voters of the town of Reidsville the question as to whether or not the said town, through its commissioners, should make sale of the electric plant, appliances, and fixtures of said town to the Southern Public Utilities Company for the sum of $30,000, as provided and set forth in a certain ordinance adopted 11 September, 1917; and the said election so held was confined to this question alone; that as a result thereof 392 votes were cast in favor of said sale, and 68 votes as against the sale; that the machinery provided for the holding of said election, and the holding thereof, was such as provided by law, and that, in pursuance of said ratification of such contract by the voters, as indicated above, the commissioners of the town of Reidsville executed said contract set forth in said ordinance, and in pursuance thereof made a deed, as provided therein, to the said Southern Public Utilities Company."

The plaintiffs moved for judgment upon the record chiefly upon the ground that the contract of sale to the utilities company was void because it was not made at public auction, and because two propositions, one to sell the plant and the other to grant a franchise, were submitted upon one ballot.

The defendants moved for judgment upon the pleadings upon the following grounds:

1. That the only relief prayed in the original complaint, and the only relief to which the plaintiffs might in any event have been entitled, was an injunction preventing the holding of an election and the consummation of the sale of the plant upon the terms and conditions set forth in the pleadings, and it appears that since the institution of the restraining order herein the election has been held and the sale consummated.

2. The replication departs from the cause of action alleged in the original complaint, and introduces a new and distinct cause of action, based upon the facts which arose subsequent to the institution of this action.

The defendants also moved for judgment upon the ground that upon the admissions of the plaintiff the contract of sale was valid and binding between the parties.

Upon an intimation of his Honor that he would grant the motion to dismiss the action, the plaintiffs offered to introduce evidence in support of the allegations of the complaint.

His Honor refused to hear the evidence, and the plaintiffs excepted.

Judgment was then entered dismissing the action, and the plaintiffs excepted and appealed.

W. P. Bynum, R. C. Strudwick, W. R. Dalton, J. R. Joyce, and King & Kimball for plaintiff.

P. W. Glidewell, W. M. Hendren, A. L. Brooks, and J. M. Sharpe for defendant town.

Osborne, Cocke & Robinson for defendant utilities company.

ALLEN, J., after stating the case: This action cannot longer be maintained for the purpose for which it was instituted—to restrain the holding of the election on 23 October, 1917—because the election has already been held. In *Sasser v. Harriss*, at this term, which was brought to restrain the holding of a primary election, *Brown, J.*, says: "It appears that the primary election has long since been held, and doubtless the candidates now have been duly elected. Nothing can now be accomplished by setting aside the order of *Judge Calvert*. If his judgment was reversed, this Court could not now order another primary. The question has thus become merely a moot question, and there is nothing for the judgment of the Court to operate upon."

Nor can the plaintiff assail the contract between the town of Reidsville and the utilities company on the ground of fraud, or otherwise, in this action, because there was no contract until it was approved by the voters, which was long after the commencement of the action, and "certainly the principal cause of action must exist in all cases at the time the action began. It would be unjust and absurd to bring a party into court to answer the plaintiff before he had a right to sue. The mere fact that the cause of action is introduced into a pending action cannot alter the case, because this, in effect, makes the action a new one." *Clendenin v. Turner,* 96 N. C., 421.

"While courts are liberal in permitting amendments, such as are germane to a cause of action, it has been frequently held that the Court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment. *Best v. Kinston*, 106 N. C., 205; *Merrill v. Merrill,* 92 N. C., 657; *Clendenin v. Turner,* 96 N. C., 416." *Bennett v. R. R.,* 159 N. C., 345."

The judgment of the Superior Court dismissing the action must therefore be affirmed in any event, but as other questions of public interest, which ought to be settled, have been discussed, we will consider them, first eliminating extraneous matters alleged in the pleadings, which have no bearing on the legal questions presented by the appeal.

Prominent among these are the allegations of collusion between the mayor and commissioners and the utilities company to defraud the citizens of Reidsville; that the utilities company is subsidiary to the Southern Power Company; that the utilities company, the Southern Power Company, and the American Tobacco Company have stockholders in common; that the American Tobacco Company nominated and elected the defendants, and other allegations of improper influences brought to bear on the defendants, dishonest motives on their part, and fraud.

These cannot be considered because they are denied by the defendants, and the plaintiffs have not only acquiesced in the finding of *Judge Harding* "that there is not evidence of any corruption or fraud on the part of the defendants in entering into the contract set out in the pleadings, or in calling and ordering an election for the ratification of the contract by the said voting citizens of the town of Reidsville," but they have also abandoned the exception taken on the trial to the refusal to permit them to introduce evidence to support the allegations of the complaint, which can only be accounted for on the theory that they could not prove what they alleged, or, if proven, the facts would not, in their opinion, affect a contract made by the people themselves.

The exception is abandoned because not referred to in the brief. Rule 34.

Recognizing this condition of the record, the plaintiffs rely in their brief on their motion for judgment on the admissions of record, and in the pleadings, which is upon three grounds.

(1) That the purchase price of $30,000, when an offer of $50,000 had been made, is so grossly inadequate as to amount to fraud.

(2) That the election is void because two unrelated propositions were submitted to the voters on one ballot, the sale of the electric light plant and the granting a franchise to the utilities company.

(3) That the sale is void because not made at public auction.

There might be room for debate as to the first position of the plaintiffs if the only consideration for the contract was the amount of money to be paid in cash, but this is not so. On the contrary, the defendants considered the advantages to the community of securing hydro-electric power offered by the utilities company, instead of steam power offered by Talbott and his associates, the ability of the respective parties to perform their contracts, the fact that the utilities company could install additions to the plant within ninety days sufficient to furnish a much needed increase of power, while Talbott and his associates had to organize a corporation to perform their contract, and could not make the necessary additions in less than twelve months; that the expense of pumping would be less under the utilities contract, and concluded that the contract offered by the utilities company was most advantageous to the citizens and taxpayers of Reidsville.

There is, therefore, no admission that the consideration for the contract is inadequate, and as we are now dealing with a motion for judgment on the admissions of the parties, this contention of the plaintiffs cannot be sustained.

The principle that unrelated propositions ought not to be submitted to a vote on one ballot, is fully recognized, and it is of the first importance that this principle should be strictly observed as the will of the voter ought not to be coerced, and he ought not to be in the situation where he must vote for a proposition to which he is opposed in order that he may support one he favors (see *Winston v. Bank*, 158 N. C., 512;

Keith v. Lockhart, 171 N. C., 457; *Hill v. Lenoir,* 176 N. C., 572), but it would seem that the sale of an electric light plant and the grant of a franchise to the purchaser under which it could be operated are parts of one whole, and as closely related as any two questions could be (see *Briggs v. Raleigh,* 166 N. C., 149), and, if not, the plaintiffs have admitted "that an election was duly called, at which election there was submitted to the voters of the town of Reidsville the question as to whether or not the said town, through its commissioners, should make sale of the electric plant appliances and fixtures of said town to the Southern Public Utilities Company for the sum of $30,000, as provided and set forth in a certain ordinance adopted 11 September, 1917, and the said election so held was confined to this question alone," thus showing that one and not two propositions were submitted to the voters.

The remaining question involves the power of the town of Reidsville to sell its light plant at private sale, subject to the approval of the voters, instead of at public auction, and this requires an examination and construction of the following statutes:

Rev., 2978: "By mayor and commissioners at public sale. The mayor and commissioners of any town shall have power at all times to sell at public outcry, after thirty days notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best."

Rev., 2916 (6): "To grant, upon reasonable terms, franchises for public utilities, such grants not to exceed the period of sixty years, unless renewed at the end of the period granted; also to sell or lease any waterworks, lighting plants, gas or electric, or any other public utility which may be owned by any city or town: *Provided,* in the event of such sale or lease it shall be approved by a majority of the qualified voters of such city or town, and also to make contracts, for a period not exceeding thirty years, for the supply of light, water, or other public commodity: *Provided,* this subsection shall not apply to New Hanover and Cumberland counties."

Ch. 28, Private Laws 1917, sec. 1: "That the following provisions of subsection six of section two thousand nine hundred and sixteen of the Revisal of one thousand nine hundred and five shall not apply to the town of Reidsville, in Rockingham County, namely: '*Provided,* in the event of such sale or lease it shall be approved by a majority of the qualified voters of such city or town.'

"Sec. 2. That said town of Reidsville may sell or lease any of its public utilities, such as lighting plants or system mentioned in said subsection: *Provided,* in the event such sale or lease, which shall be approved by a majority of the votes cast in any election at which said proposition may be submitted; said election to be held under the same general rules, laws, and regulations of elections for town officers in the town of Reidsville."

These statutes, relating as they do to the same subject, should be read in connection with each other, as together constituting one law, giving effect to all parts of the statutes if possible, and the history of the legislation may be considered in the effort to ascertain the uniform and consistent purpose of the Legislature. 39 Cyc., 1150.

"All statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law, and with reference to it. They are, therefore, to be construed as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the Constitution, but also in connection with other statutes, on the same subject, and, under certain circumstances, with statutes on cognate and even different subjects. This rule of construction, however, so far as prior statutes are concerned, is to be restricted to cases where the statute in question is really doubtful; if the statute is clear on its face, prior statutes may not be consulted to create an ambiguity." 36 Cyc., p. 1146.

Section 2978 of the Revisal, formerly section 3824 of the Code of 1883, requiring a sale at public outcry, was first enacted (ch. 112, Laws 1872-3), and it received authoritative construction in *Southport v. Stanley,* 125 N. C., 464, as follows:

"The reasonable construction of the statute must be that the town or city authorities can sell any personal property, or sell or lease any real estate which belongs to the town or city as the surplus of the original acreage ceded for the town or city site, or such land as may have been subsequently acquired or purchased; but in no case can the power be extended to the sale or lease of any real estate, which, by the terms of the act of incorporation, is to be held in trust for the *use* of the town, or any real estate with or without the buildings on it, which is devoted to the purposes of government, including town or city hall, market houses, houses used for fire departments or for water supply, or for public squares or parks. To enable the town or city authorities to sell such of the real estate of the town or cities as is mentioned just above, there must be a special act of the General Assembly authorizing such lease or sale."

The effect of this decision is that property of the city or town, such as parks, markets, city halls, waterworks, lighting plants, etc., held for the use of the public, are not within the provisions of Rev., 2978, and cannot be sold thereunder, and that, if sold at all, additional authority must be conferred by the General Assembly.

If there was any doubt of this being the correct view of the *Southport case,* it is put at rest by the unanimous opinion of the Court in *Church* *v. Dula*, 148 N. C., 266, in which *Hoke, J.*, speaking for the Court, says: "This view is not affected in any way by the case of *Southport v. Stanley*, 125 N. C., 464, to which we were referred by plaintiff's counsel. That decision was to the effect that the general power conferred on the authorities of a town to sell and dispose of town property by section 3824 of the Code of 1883 (Rev., 2978) does not give the right to sell property held in trust for the public; for any such purpose there must be an act of the Legislature conferring special power."

Under this construction of the statute it became necessary to provide means for selling and leasing property, held for the use of the public, as frequently a sale or lease would be advantageous and would promote the public welfare, and to provide this remedy, section 2916, subsection 6, was enacted, which deals with the property, which the Court said was not embraced in section 2978, and thus understood, the two sections mean that under section 2978 the mayor and commissioners shall have power to sell at auction any property except that held for a public use, and under section 2916, subsection 6, that they may sell property held for a public use, subject to the approval of the voters.

The two sections are consistent with each other, and in entire harmony. They were enacted at different times, for different purposes, and deal with different classes of property. The General Assembly evidently thought that in the sale of property, not held for a public use, such as a fire engine which had ceased to be of any value to the town on account of changed conditions, it was a sufficient protection to have a sale at public auction, but that when the property belonged to the other class the approval of the voters, the real owners, should be had.

There is no reason for reading into the later section that the sale shall be by public auction, in addition to submitting the question to a vote, and to do so would impose a cumbersome, confusing procedure instead of one that is intelligent and easily understood.

If the position of the plaintiffs should prevail, the governing body of the town or city would have to offer the property at public sale, at which any one could bid, who could comply with the terms of sale, and after the highest bidder is ascertained the whole question would have to be submitted to a vote, while under the other view the governing body can advertise for bids, can consider the needs of the community, the ability to perform for the present and the future, and can present to the voters a mature plan for their approval or disapproval.

The second statute, in our opinion, substitutes a vote of the people as to property held for a public use, for a public sale of other property, and the will of the people having been fairly ascertained, as the plaintiffs admit, and emphatically expressed, as to a sale of their own property there is no reason for setting it aside.

If any further authority was needed, it is conferred by chapter 28, section 2, Private Laws 1917, which enacts:

"Sec. 2. That said town of Reidsville may sell or lease any of its public utilities, such as lighting plants or system mentioned in said subsection: *Provided*, in the event such sale or lease, which shall be approved by a majority of the votes cast in any election at which said proposition may be submitted; said election to be held under the same general rules, laws, and regulations of elections for town officers in the town of Reidsville."

There is some confusion in the language, but the intent is clear to give the power to the town of Reidsville to "sell or lease" its lighting plant without other restriction than the approval of the people at the polls, and as the sale has been made, and has been approved by a vote of 392 for the sale, and 68 against it, there is no valid reason for disturbing it.

There is not a scintilla of evidence that the utilities company is seeking to acquire a monopoly, and, on the contrary, it offers in its answer, and renews the offer in this Court, to abandon the contract of purchase.

It has done nothing except to make an offer to purchase the lighting plant for a certain amount of money, and upon certain conditions, which the governing authorities of Reidsville have accepted, and which has been ratified by popular vote on a legal referendum.

We should assume, in the absence of a finding to the contrary, that the mayor and aldermen of Reidsville, elected when the question of a sale of the lighting plant was acutely at issue, have acted in good faith, and that the voters had sufficient intelligence to understand the proposition, which they approved by their vote, and certainly we have no authority to deny to them the right to contract in reference to their own property upon the assumption of superior wisdom and business ability.

There are allegations of fraud in the complaint, which are denied in the answer, but no evidence to support the allegations has been introduced, and the exception to the refusal to receive such evidence has been abandoned, and is not referred to in the plaintiff's brief.

It would not, therefore, be just or according to law to base our judgment on unsupported allegations, and to make a part of our permanent records, so serious a reflection on the integrity of the mayor and aldermen of Reidsville as men and public officials without proof.

There can be nothing in the contention that two unrelated questions have been submitted to the voters, because the plaintiffs have agreed, by stipulation filed in the record, that the question of a sale of the lighting plant was submitted, and that "the election so held was confined to this question alone."

It is also agreed that the election was "duly called," and that "the machinery provided for the holding of said election, and the holding thereof, was such as provided by law."

Affirmed.

CLARK, C. J., dissenting: The powers of municipal corporations, as stated in Dillon Mun. Corp. (5 ed.), sec. 237, and approved in *Smith v. New Bern,* 70 N. C., 14, are as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no other: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable." Rev., 2978 (originally enacted, ch. 112, Laws 1872-3), under the heading, "Municipal Property Sold," provides: "By mayor and commissioners at public sale. The mayor and commissioners of any town shall have power at all times to sell at public outcry, after thirty days notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best."

The defendant, Southern Public Utilities Company, a corporation of the State of Maine, claims to have bought at private sale the valuable "lighting and power plant," the property of the town of Reidsville, for $30,000, being $20,000 less than was offered by the plaintiffs, who were shown to be responsible bidders and in direct violation of the above statute, for there was no sale "at public outcry, after thirty days' notice, to the highest bidder," which was the only condition under which the above section gave power to the commissioners of the town to sell. Said statute has never been repealed or amended in any way, and the action of the commissioners was therefore in violation of the terms of the statute conferring the power.

Indeed, the decisions of this Court, which have been unquestioned till now, held that even this section "did not authorize the sale or release of real estate which by the terms of the act of incorporation is to be held in trust for the use of the town, or to such real estate as is devoted to governmental purposes, as city hall, market house, etc., but a special act of the Legislature is necessary in such cases." *Southport v. Stanly,* 125 N. C., 464; *Turner v. Comrs.,* 127 N. C., 154. The Court went further and held that the Legislature could not authorize the sale of streets in reference to which bordering property owners had located improvements. *Southport v. Stanly, supra; Moose v. Carson,* 104 N. C., 431. The Legislature subsequently passed a general act as to the corporate powers of towns, which is now Rev., 2916 (6): "To grant, upon reasonable terms, franchises for public utilities, such grants not to exceed the period of sixty years, unless renewed at the end of the period granted; also to sell or lease any waterworks, lighting plants, gas or electric, or any other public utility which may be owned by any city or town: *Provided,* in the event of such sale or lease it shall be approved by a majority of the qualified voters of such city or town, and also to make contracts, for a period not exceeding thirty years, for the supply of light, water, or other public commodity: *Provided,* this subsection shall not apply to New Hanover and Cumberland counties."

It will be seen at once that this act does not modify the protection given to the people of the towns and cities of this State that the public property held by the town can only be sold "at public outcry after thirty days notice to the highest bidder," but that it allows the sale of the kind of property therein named (*provided,* there is, as required by sec. 2978, the above requirements of a sale open and aboveboard, by public outcry, and after thirty days notice, and to the highest bidder), when there is the additional guarantee that in such case there is an approval by a majority of the qualified voters of such city or town.

This is not only according to the well established rules that the whole of the Code must be construed together, and that the law does not permit repeals by implication, but it is in accordance with the well known conditions of modern society, in which huge aggregations of capital, incorporated usually in other States, are seeking to engross and take over the property, whether of State, county, city, or town, when that purpose can be attained by any means.

This section 2916 (6), according to the well settled principles applying to the interpretation of statutes, must be read in connection with section 2978, and the decision in *Southport v. Stanly.*

Chapter 28, Private Laws 1917, in no wise affects this well settled principle, but merely provides that the requirement in sec. 2916 (6) of approval by a majority of the "qualified" voters is modified to permit that in Reidsville the approval may be made "by a majority of the votes cast." Why Reidsville should be exempted from the safeguard of approval by the majority of the qualified voters, still required as to the sale of public utilities in every other municipal corporation in North Carolina, does not appear.

In the absence of a statute there was no authority in any town to sell any of its real estate of any kind held for public purposes. Rev., 2978, authorized the mayor and commissioners to sell the municipal property, "provided it was done at public outcry, after thirty days notice, to the highest bidder." The decisions of this Court, in the cases above cited, held that this did not authorize, even under those conditions, "the sale of real estate devoted to governmental purposes, as city hall, market house, street, etc." Subsequently, Rev., 2916 (6), authorized "the sale or lease of waterworks, lighting plants, gas or electric, or any other public utility which may be owned by any city or town," but with the additional guarantee—the word "*provided*" is used—in case of such sale or lease "the sale or lease shall be approved by a majority of the qualified voters of such city or town," and the so-called Glidewell Act only modifies the latter provision by providing that as to the town of Reidsville the approval shall be sufficient if made "by a majority of the votes cast."

There has been no express repeal, and there is no implied repeal, of the guarantee of the safety of the property of any city or town, given by the requirement that a sale thereof can be made (if at all) only "at public outcry, after thirty days notice, to the highest bidder"—which was itself a modification of the common law which forbade a sale of real estate devoted to governmental purposes at all. *Winslow v. Morton,* 118 N. C., 486; *S. v. Johnson,* 171 N. C., 799; *S. v. Perkins,* 141 N. C., 797.

The effect of construing 2916 (6) to repeal by implication Rev., 2978, is that this corporation of the State of Maine has obtained, if this action is approved, the ownership of a public utility of the town of Reidsville, in the State of North Carolina, at a sum at least $20,000 less than that which was offered for it by responsible parties before the sale was made.

The plaintiffs allege that the property is worth $75,000, and that for many years it has produced a *net* income averaging more than $8,000 per annum. The chief relief asked, and justified by allegations and proof offered to support them (which was rejected by the Court), was not the temporary restraining order, which was merely ancillary, but to have the attempted sale set aside as fraudulent and void.

It is urged that the sale was approved by a popular vote, but it is apparent that there was no popular vote upon this question. No one will believe that the people of Reidsville would by popular vote approve a sale at $30,000 when $50,000 was offered at the same time by parties fully able to make the payment. The only proposition submitted at the election was whether the town should take $30,000 from this corporation or not sell at all.

There are allegations in the complaint that this result and method of making the sale was procured by fraud or corruption. There was no opportunity given to prove this, because an investigation was cut off by judgment for the defendants on the ground that the election had been held and the contract signed, though the question as to their validity still remained open. In 1 Lewis Southerland on Statutory Construction, sec. 267, it is said: "Repeals by implication are avoided if possible. If two statutes can be read together without contradiction or repugnancy, or absurdity, or unreasonableness, they should be read together, and both will have effect. It is not enough to justify the inference of repeal that the later law is different; it must be contrary to the prior law. It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former, for it may be merely affirmative, accumulative, or auxiliary. There must be positive repugnancy, and even then the old law is repealed by implication only to the extent of the repugnancy. If, by a fair and reasonable interpretation, acts which are seemingly incompatible or contradictory, may be enforced and made to operate in harmony and without absurdity, both will be upheld and the later one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable." To the same effect in sec. 247 of the same volume, and, indeed, all the authorities and precedents on the construction of statutes.

There is no repugnancy between Rev., 2916 (6) and Rev., 2978. The latter section remains in full force, therefore, in requiring the safeguard of a sale "at public outcry, to the highest bidder, after thirty days notice." The provision in the latter statute authorizes the sale by public utilities (if made in accordance with the terms of Rev., 2978), *provided*, that is, "but only if," there is the additional requirement of the "approval of a public vote." Without this provision of 2916 (6), even public utilities could not have been sold under the construction placed by the Court upon Rev., 2978, in the cases above cited. The authority to sell even in compliance with the terms of Rev., 2978, of a "public sale, to the highest bidder, after thirty days notice," did not extend to the sale or lease of public utilities till Rev., 2916 (6), and then only with the "approval of a popular vote." *Elizabeth City v. Banks*, 150 N. C., 407.

In 2 Dillon Mun. Corp., sec. 801, it is said: "Where the charter or incorporating act requires the officers of a city to award 'contracts to the *lowest bidder*,' a contract made in violation of its requirement is illegal." And in sec. 809 he says: "The purpose of a statute requiring the letting of bids to the lowest bidder is to invite competition, and to that end publicity of the intention to let the contract is of the essence of the proceeding. Hence, any *statutory provisions requiring advertisement* or specifying its nature, are usually to be regarded *as mandatory*, and failure substantially to comply with their requirements is sufficient to avoid the contract."

Under our statutes, read as they are required to be read, upon reason and authority, *in pari materia*, the proper and only valid course that this corporation of another State, seeking to acquire the municipal franchise of operating the Light & Power Plant of Reidsville, could pursue was as follows:

1. There should have been the approval of a popular vote, whether the town should sell its lighting system, on the terms stated in the advertisement.

2. If it was so approved by a popular vote, then the town officials, in compliance with Rev., 2978, should have advertised such sale by thirty days notice, and sold at public outcry to the last and highest bidder. Nothing less than this would be valid under the laws of this State, nor in compliance with the rules of prudence and fidelity to their trust, which the law exacts of all public officials in dealing with public property.

3. Even after such bid there would still have remained in the administrative officers the legal discretion to reject the highest bid and offer at resale if there was reasonable ground to believe that upon such resale a substantially better bid could be had. This is done in the sale of private property under decree of court, and certainly public officials should show the same solicitude and care in the disposal of public property.

The commissioners of Reidsville were certainly not warranted by law in submitting to the voters the question of sale or no sale of the lighting plant, to so phrase the submission as to require the electors as a condition of voting upon the sole question of sale or no sale to vote also in favor of a private sale to the Southern Public Utilities Company, and giving a thirty years franchise to it, and in further refusing to submit at the same time the proposition of the plaintiffs, shown to be responsible parties, to buy the same plant at the price of $50,000.

This Court, in *Winston v. Bank,* 158 N. C., 513, has condemned the course pursued in this case in the following unmistakable language, by *Mr. Justice Hoke:* "When a popular vote is required to authorize or validate a municipal indebtedness, the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded an opportunity to express his preference or decision on a single ballot, and on a question as an entity, the election, as a rule, is invalid, and on objection made in apt time, and in a proper way, may be disregarded."

This is the clear and convincing language used by *Mr. Justice Hoke,* quoting from many other learned judges, and especially approving the following language by *Mr. Justice Brewer* (later of the U. S. Supreme Court), in *Lewis v. Comrs.,* 12 Kan., 186, as follows: "It may be conceded that two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined and the real will of the people overslaughed. By this combination an unpopular measure may be tacked on to one that is popular, and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of the few. Things odious and wrong in themselves may receive the popular approval because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular elections, that aims to secure freedom of choice, not merely between parties, but also in respect to every office to be filled and every measure to be determined. A voter at a State election would be shocked to be told that because he voted for a person named for Governor on one ticket he must vote for all other persons named thereon; or that, voting for one person, he was to be understood as voting for all. He would feel that his freedom of choice was infringed upon. None the less is it so by such a submission as this."

So elementary and necessary a truth could not be more clearly expressed. It needs no repetition, but can be found stated in the legal decisions of all the courts that have treated upon the necessity of the utmost fidelity in the handling and disposition of public property by municipal officials. Many of these authorities are cited by *Judge Hoke* in the above case of *Winston v. Bank.*

The defendants, while averring the acceptance of a lower bid by a vote of the people, did not allege or contend that the $50,000 bid had been also submitted, nor that there had been any compliance with the unrepealed and unamended section 2978 of the Revisal, which is an express inhibition upon all power in municipalities to sell real or personal property except "at public outcry, after thirty days notice, and to the highest bidder."

The motion by the plaintiff for judgment upon the pleadings should have been granted because it appears thereon that there was no compliance with the requirements of that section, which was the common law and has been the statutory law in this State since chapter 112, Laws 1872-3. As to the defendants' defense that the sale has been ratified by the administrative officers of the town, it can need no citation of authority that if there was no authority to sell without compliance with the requirements of section 2978 there can be no ratification of action which was void because *ultra vires.* 2 Dillon Mun. Corp., sec. 797.

In *Edwards v. Comrs.*, 170 N. C., at p. 451, the Court said: "We were referred, on the argument to *Stratford v. Greensboro*, 124 N. C., 127, in support of the position that on the present record the action of the commissioners could well be made the subject of judicial scrutiny and control, but in that case there was specific allegation, with evidence tending to show that the action of the city authorities was in pursuance of a contract admittedly entered into with the individual defendant, and making it according to plaintiff's evidence, *not at all improbable that the measure complained of was in promotion of a personal and private scheme, in favor of the individual defendant, and not in furtherance of the public interests.*"

In this case, as in that, "the allegations are specific and definite of issuable facts tending to establish official default." The authorities are numerous that the plaintiff as taxpayer has a right to challenge the action of the board of commissioners in rejecting a bid of $50,000 and submitting one in favor of the defendant corporation of $20,000 less. *Coughlin v. Gleason,* 121 N. Y., 631, and numerous other cases; *Mazet v. Pittsburg,* 137 Pa., 548; *Stratford v. Greensboro,* 124 N. C., 127, and others, which it is unnecessary to cite, for it should need no argument that when there are allegations, such as those made in the complaint in this case, of misfeasance on the part of the town officials and collusion by them with the purchasers by which the city lost $20,000, it is due to all parties concerned, and in the interest of public justice, that the facts should be determined by a jury of 12 honest men. Public officials should wish to be like Cæsar's wife, "above suspicion," and not shut off the investigation of such charges, when made in the courts by reputable citizens.

There was no sale to the highest bidder (but to one $20,000 lower), no advertisement, and no public outcry, as required by the statute. A bid was accepted for $30,000, and no submission of the higher bid then outstanding for $50,000, and the $30,000 was submitted as a part of the proposition to sell the municipal lighting plant so that the two propositions being intermingled a vote against accepting $30,000 was a vote against selling at all. The sale of public property upon a grossly inadequate price has been held ground for indictment. *S. v. Hatch,* 116 N. C., 1003.

The determination of such charges, when made in a court of justice in this State, should be made after the fullest investigation, and inquiry should not be cut off. The matter should not have been determined upon the technicality of the refusal of an injunction, which refusal was itself erroneous. This is not like the case of a tree cut down, which cannot be restored, nor like the recent case where, after the refusal of an injunction against a primary, the general election had been held. For here this action calls in question the validity of the election whenever it was held, and if in law it was invalid, the so-called election was a nullity. In any event, the plaintiffs were entitled to have it impeached, and the sale thereunder set aside, if the allegations of fact were sustained by the verdict of a jury, and they had a right to offer evidence in support of their charges, and to a verdict by a jury. The sale and the so-called election are not validated because they have occurred. The consummation of a fraud is no estoppel upon the courts to set it aside, if proven.

The very gist of this action was to call in question the legal right of the defendants to hold the election and to allege as a matter of fact that by reason of collusion and fraud it would be invalid if held. It is no answer to these allegations of law and fact that, notwithstanding, such election has been held. If the contentions of the plaintiffs, either as to law or facts, are valid, then the so-called election was a nullity and should be set aside. To hold otherwise is to sustain the proposition that when an illegal act has been committed it cannot be investigated in the courts. These defendants proceeded with the alleged election and the alleged sale with notice of the plaintiffs' proceeding. They are put in no better position thereby if the plaintiffs can show the illegality of the proceedings or the alleged fraud and collusion in pursuance of which the alleged election and the sale were made.

If the law is as claimed by the plaintiffs, then the sale should be set aside. If the facts are as alleged by them, it should be equally set aside for that reason, and the plaintiffs are not cut off from an investigation by a jury of the allegations of fraud, because the defendants have accomplished their purpose to the extent of making the sale, if those allegations are found to be true.

The plaintiff moved for judgment because it affirmatively appeared from the answer of the defendants, and especially from the answer of the defendants, commissioners of Reidsville, that the town had attempted to make a private and not a public sale of its lighting plant to the defendant, "Southern Public Utilities Company," at the price of $30,000, privately and not publicly bid, which said price was by $20,000 less than could and would have been received from another responsible bidder, "who had validly and legally bound himself to pay said increased price upon any sale had in accordance with law, and that said sale was made in violation, notably, of sec. 2978, which prohibits all North Carolina corporations from conveying either their personal or real estate, except at public outcry, to the highest bidder, after thirty days advertisement."

2. Because Rev., 2916 (6), and ch. 28, Private Laws 1917, should be construed strictly in favor of the public, and as additional to, and not as an implied repeal of, Rev., 2978.

3. That compliance with said sec. 2916 (6), as amended by ch. 28, Private Laws 1917, was only one of the several requisite essential acts necessary to a valid alienation of municipal property.

. . . .

7. Because it affirmatively appears from the answer that as an integral part of the ordinance ordering the so-called election, and hence prior to any election, there was granted to the defendant "The Southern Public Utilities Company," a thirty years franchise to enter upon and occupy the streets of the town of Reidsville with a lighting plant, thereby cutting off the possibility of competition in the sale of its own lighting plant, even had it been exposed to sale by public auction, after due advertisement according to law.

On these grounds it was error to refuse the above motions for judgment in favor of plaintiff, and also for the further reason, heretofore given, that the submission of the double proposition of the sale, and at the same time, as a part thereof, the acceptance of the $30,000 bid by the Southern Public Utilities Company, and also the refusal to submit the proposition of a responsible bidder at $50,000 were illegal in fact and in law. *Winston v. Banks, supra.*

The defendants moved to dismiss the action because it appeared that the sale had been made and the election had been held. This was error, as has already been pointed out, for the election and the contract were both with notice of this proceeding, impeaching their validity in law, and the good faith in the sale of public property as a matter of fact, and the subsequent consummation of such illegal acts is not validated thereby, but was subject to investigation of the allegations of fact and the propositions of law set out by the plaintiffs.

It may well be doubted if a more important case than this has ever come before this Court. It is alleged in the complaint that the defendant, Southern Public Utilities Company, is essentially an *alias* for the Southern Power Company and the American Tobacco Company, or at least it is a mere subsidiary corporation. The defendant company denies the allegation as stated, but admits that all three have many stockholders in common. Whether there is not a more intimate connection in the ownership of the bonds, or a lease of the other corporations by one (which is not unusual), is not stated.

It appears from the official reports of the investigations in Congress of the water power in this country that 94 per cent of the total water power in North Carolina has, in one way or another, been acquired by corporations. If it is not identically one corporation, substantially one great corporation controls the situation, which is reaching out, as appears by the docket of this Court, to acquire a monopoly of the entire water power of this State. See *R. R. v. Southern Power Co.,* and other cases at this term. Not for nothing did our ancestors condemn monopolies in our Constitution, because they "are contrary to the genius of a free State and ought not to be allowed." Cons. N. C., Art. I, sec. 31.

This corporation has thus attempted to consummate its acquirement of the lighting and electric plant built by the town of Reidsville, at the expense of its taxpayers, and, admittedly, at a sum $20,000 less than that bid by a responsible party. It appears that it was a corporation of the State of Maine, and a subsidiary corporation of the Southern Power Company, which is seeking to run a municipal plant for a town in North Carolina. "There is a reason," though it has not been stated, nor has compliance by it with our statute been shown. It further appears not only that it has already acquired, by means not disclosed, other public utilities in this State, but it appears from another case, now pending in this Court, that the Southern Power Company, with which it has close relations, admittedly is seeking to discriminate in its charges against a municipal plant in the town of Salisbury. If that discrimination were allowable, the Southern Power Company could speedily acquire the ownership not only of every municipal lighting and power plant in the State, but, by the exercise of such discrimination, it would sooner or later have it in its power to acquire every cotton mill or other industrial plant in this State dependent upon electric power, for the time is near at hand when, with the exhaustion of the coal beds, or interruption in their operation, no industrial plant in this State can exist with the discrimination of this great monopoly in charging it higher rates for electric power than it charges other plants of like kind. This would mean financial and political control of the State, and is a menace that is apparent and cannot be disregarded.

It is not desirable that powerful monopolies should thus engross the water power, the lighting and electric plants, of a whole State. The declaration in our Constitution against monopolies should be sacredly remembered and observed. This is more necessary now than when written by the great patriots who made it. Monopolies are dangerous, and should not be permitted to engross the power and lighting plants now in existence, either by purchasing those owned by the public, at an under price and without publicity, or to obtain the control of other industrial plants, whether public utilities or under private ownership, by being permitted to charge discriminatory prices, which is simply a form of confiscation.

It is true that in this case the judge found as a fact, upon the preliminary injunction, that there was no fraud or collusion. He could do so as to the injunction proceeding, though even as to that his findings would not be binding on this Court on appeal, and such finding has no effect upon the issues raised on the pleadings, in which fraud and corruption is clearly charged, and being denied, there are issues of fact which only a jury can determine. There are many allegations in the complaint of specific acts tending to show fraud, collusion, and improper influence, which, if found true by a jury, would entitle the plaintiffs to have the sale set aside, irrespective of the defendants' failure to observe the requirements of Rev., 2978, and of the illegal manner in submitting a double issue as above stated. These allegations of fraud and collusion the plaintiffs are entitled to have submitted to a jury.

The prayer for relief in the complaint is to declare the attempted sale fraudulent and void, and to set it aside, and for a restraining order until the issues are determined by a jury. The plaintiffs asked to introduce evidence in support of their allegations of fraud and collusion, but this was refused by the court, and the action was dismissed.

It is due to the defendants, as well as to the plaintiffs, and in the interest of public justice, that these charges should be investigated and determined by a jury, and it was error to dismiss this action.

There are in the complaint the fullest and most specific charges of fraud and collusion against the defendant Southern Public Utilities Company, and the authorities of the town of Reidsville, and that said company was a branch of the American Tobacco Company and the Southern Power Company, with their widely extended properties, and that the American Tobacco Company was active in procuring the election of the defendant mayor and commissioners. There are other specific acts of collusion and misconduct charged, and that the defendants used improper means to influence the vote at the election on the sale of the property to themselves at an under price. These allegations were denied, but the plaintiffs were entitled to have the issues arising thereon, with the inferences, submitted to a jury. There was no opportunity to prove these allegations, for the judgment recites: "The plaintiffs thereupon offered to introduce evidence of all allegations in the complaint not admitted by the answers of the defendants, which motion (or offer to introduce evidence) is hereby denied, and the plaintiffs in apt time except."

The appeal brings up this judgment for review, and this exception was earnestly presented on the argument here, and is also presented by the plaintiffs in the brief, on page 10, alleging "the allowing defendants' motion to dismiss the action" as one of its *chief grounds* of appeal, and again on page 41. Indeed, this denial to the plaintiffs of the right to trial by jury of the serious issues of fact raised by the allegations in the complaint runs through the entire appeal as the substratum and foundation of the appeal. It is not shown that the official body of Reidsville committed fraud and collusion in the sale of this property, but it is clearly and distinctly averred, and denied, and the plaintiffs had a right to have opportunity to prove it to a jury. The brief also avers, and stresses with full citation of authorities, the exception that two unrelated matters were illegally submitted to a vote, to the great prejudice of the plaintiffs.

F. M. HINSON AND WIFE v. JOHN KERR AND WIFE.

(Filed 26 November, 1919.)

Deeds and Conveyances—Probate—Husband and Wife—Private Examination—Contracts to Convey—Bond for Title—Adverse Possession—Limitation of Actions.

A contract to convey the wife's land, joined in by her husband, but without probate and the privy examination of the wife, is void, and the possession of the grantee thereunder is not hostile to the wife's interest or title to the lands, and will not ripen his title by seven years adverse possession, without evidence to show payment of the purchase money or of any act or conduct on his part hostile to the wife's title.

APPEAL by defendant from *Shaw, J.*, at the September Term, 1919, of MECKLENBURG.

This is a proceeding for the partition of land transferred to the Superior Court upon an issue of sole seizin relied on by the defendant.

Prior to 1896 Tirsey Hinson, a married woman, was the owner of the land in controversy, and on 29 September, 1896, the said Tirsey Hinson and her husband delivered to the defendant a paper-writing in the form of a bond for title, agreeing to convey said land to the defendant upon the payment of $400.

The paper-writing was signed by the said Tirsey Hinson and her husband, but there was no probate to the same, and the private examination of Tirsey Hinson was not taken.

Tirsey Hinson died on 7 December, 1896, leaving a will in which she devised said land to her two sons, William R. Hinson and F. M. Hinson, with the right in her husband to have the use and benefit of said land during his lifetime, which said will was probated on 9 January, 1897.

On 26 May, 1899, William R. Hinson, one of the devisees in the will of Tirsey Hinson, conveyed his undivided one-half of said land to the defendant.

E. H. Hinson, the husband, died on 21 October, 1916, and this proceeding was instituted on 24 March, 1919.

The defendant was examined as a witness in his own behalf, and testified as follows:

"I am the defendant in this case. I occupy the Nancy Little dower tract of land. I took possession of it in 1896, right immediately after this paper was executed. In September, I believe. This paper was given to me at the time. E. H. Hinson wrote that paper. I bought it in September, 1896, and I began paying taxes on it in 1897. I live on this tract of land. Yes; I built on it. I opened up the land and have been on it since that time. I have been working it since 1897. I have made tax returns for it every year since that time. Yes; the paper you now show me is the paper I spoke of just now. That is the paper that Mrs. Tirsey Hinson and E. H. Hinson signed. I went into possession of the land the day the paper was signed; he told me to go right down. Yes; I went into possession on account of that paper. Yes; I still have possession of it on account of that paper."

His Honor instructed the jury if they believed the evidence to answer the first issue "Yes," and the second issue "No," to which the defendant excepted, and the jury returned the following verdict:

"1. Is the plaintiff owner and entitled to the possession of an undivided one-half interest in the lands described in the petition? Answer: 'Yes.'

"2. Is the plaintiff's right to recover the one-half interest in said lands barred by the statute of limitations? Answer: 'No.'"

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant appealed.

Stewart & McRae and John M. Robinson for plaintiff.
J. D. McCall and J. F. Newell for defendant.

ALLEN, J. As the land in controversy belonged to a married woman, and there was no probate or private examination of the paper-writing under which the defendant entered upon the land, the paper is ineffectual to pass any title or interest in the land, and the defendant must therefore rely upon adverse possession to defeat the claim of the plaintiff.

He admits that he entered upon the land under the paper-writing, and that he has claimed under it since that time, and he fails to produce evidence of the payment of the purchase money, or of any act or conduct which has made his possession hostile to the true owner.

Under these conditions, the law is settled by a long line of decisions beginning with *Young v. Irwin,* 3 N. C., 9, decided in 1797, up to the present time, that his possession has not been adverse to the title of the true owner.

In the *Young case* the owner of the land, one Rutherford, contracted to sell to Irwin, and Irwin went into possession under the contract and remained in possession for nearly forty years, after which time an action was brought by one who claimed under Rutherford, and the defendant relied on an adverse possession to bar the plaintiff's right, and the Court said of the claim of the defendant: "When a purchaser in a case like the present takes possession, he takes it by consent of the owner, and may continue it until he fails in payment, and then is liable at law to be turned out; he does not take a tortious possession and gain a tortious fee, as has been contended; if he is not, strictly speaking, a tenant at will, his possession is that of the owner, and not a distinct independent possession opposed to his; if he is ousted of possession by a stranger, he cannot regain it by an action in his own name, but only in an action which sets up and affirms the vendor's title. Such possession of the purchaser is therefore not an adverse possession to the vendor; and if, by the act of limitations, an adverse possession is necessary to bar the plaintiff's title, such an one as has been in the present case will not answer that description."

In *Knight v. Lumber Co.*, 168 N. C., 452, the same principle is declared as follows: "It is true that, as against the vendor, the possession of the vendee, occupying under such a contract, does not, as a rule, become hostile or adverse until something has occurred that places one of the parties in the position of resistance to the claim of the other, and, until that time, the ordinary statute of limitations does not begin to run. It has been so held with us in *Worth v. Wrenn,* 144 N. C., 656, and authorities cited."

Nor does the fact that the paper-writing was void because imperfectly executed affect the character of the possession.

"As a general rule, the invalidity of the executory contract of purchase will not have the effect of rendering adverse, as to the vendor, the possession taken thereunder by the vendee who enters into possession in pursuance thereof. Although the instrument is invalid, the possession of the vendee is taken in pursuance thereof, and, therefore, amicably to the vendor; and, being so taken, it is looked upon as so continuing, regardless of the fact that the vendee cannot enforce his rights as purchaser under the contract." 1 Am. Law Rep., 1336.

This principle was applied in *Mitchell v. Freeman,* 161 N. C., 322, in which it was held that possession under a contract to convey which was void because not in writing was not adverse.

There is no error in the instructions of his Honor.

No error.

IN RE WILL OF J. ALEXANDER THOMPSON.

(Filed 26 November, 1919.)

Wills—Caveat—Purchasers from Heirs.

The purchasers of land from the heirs of the deceased owner "are interested in the estate" within the intent and meaning of Rev., 3135, and thereunder, and under the rule of justice, reason, and authority, are entitled to caveat a will brought forward many years thereafter, and admitted to probate in common form.

APPEAL by respondents from *Adams, J.*, at the Fall Term, 1919, of MECKLENBURG.

This is a proceeding to caveat a will.

J. Alexander Thompson was formerly the owner of the land, purporting to be devised by said will, a part of which, claimed by the caveators, is located in Union County.

The said Thompson died in Mecklenburg County in 1836, and as caveators allege, without leaving a will, and thereafter the caveators bought the land in Union County from his heirs.

In 1912, seventy-five years after the death of J. Alexander Thompson, a paper-writing purporting to be his will, was produced and was probated in common form in Mecklenburg County.

The purchasers from the heirs now file their caveat to the will, and the propounders demur to the petition filed with the formal caveat, stating the facts as above, upon the ground that purchasers have no right to file a caveat. The demurrer was overruled and the propounders excepted and appealed.

D. E. Henderson, E. R. Preston, and G. A. Smith for propounders.
Cansler & Cansler and R. B. Redwine for caveators.

ALLEN, J. After the paper-writing, purporting to be the will of Thompson, was probated in common form in Mecklenburg County, the purchasers from the heirs of Thompson, now the caveators, commenced an action in Union County against those named as devisees in said paper, now the propounders, in which they alleged that the said Thompson did not leave a will, and asked that said paper and the probate thereof be set aside as a cloud on their title. The defendants filed a demurrer to the complaint, and it was held in this Court, upon appeal from a judgment overruling the demurrer, that the action could not be maintained, and the paper-writing and probate could not be attacked except by direct proceeding in Mecklenburg. *Starnes v. Thompson,* 173 N. C., 467.

The purchasers then go to Mecklenburg and file this their caveat, and are met by the objection that they have no standing in court, because they have acquired their title since the death of Thompson, by purchase from the heir, and if this position of the propounders is sustained, they would have the advantage of trying the title to the land in Union County, relying upon the will, which may be a forgery, without giving any opportunity to the purchasers in that action or elsewhere, to contest its validity.

We cannot think the law would be thus untrue to itself, by making fraud possible and encouraging it, with no right to challenge the conduct of the wrongdoer, but the correct settlement of the question depends on the construction of the statute (Rev., 3135), which gives the right to file a caveat to "any person entitled under such will or interested in the estate."

The caveators are not entitled under the will. Are they "interested in the estate"?

They were interested when they bought because there was then no will, and their land might be subjected to the payment of debts; they bought from heirs, who were interested parties, and if the heirs could file a caveat, why not their assignees?

The question does not seem to have been definitely settled in this State, but the principle under which the caveators claim the right is affirmed in *Armstrong v. Baker,* 31 N. C., 114, where the Court says: "For the right to interfere in a question of probate belongs to a party in interest, which must mean some person whose rights will be affected by the probate of the instrument to the prejudice of the party."

The same general rule seems to prevail in other States, and in at least one, Kentucky, the question presented here is decided in favor of the caveators.

"The statute, in authorizing a person 'who is otherwise interested in sustaining or defeating the will' to appear and, at his election, to support or oppose its probate, means only a person who has a pecuniary interest to protect, either as an individual or in a representative capacity. An interest resting on sentiment or sympathy, or on any basis other than the gain or loss of money or its equivalent, is not sufficient, but any one who would be deprived of property in the broad sense of the word, or who would become entitled to property by the probate of a will, is authorized to appear and be heard upon the subject." *In re Will of Jane Davis,* 182 N. Y., 472.

"Page on Wills, sec. 325, construes the words 'any person interested' to mean 'a person who would take more if the will were denied probate than if it were submitted to probate,' and also that 'one who is not benefited by having the will set aside' cannot contest the will.

. . . . . .

"*In the matter of Davis,* 182 N. Y., 468, the Court defines the statutory expression, 'any person who is otherwise interested in sustaining or defeating the will,' as meaning 'a person who has a pecuniary interest to protect. . . . An interest resting on sentiment or sympathy, or any basis other than the gain or loss of money or its equivalent, is not sufficient.' To the same effect are *McDonald v. White,* 130 Ill., 493, and *Shepard's appeal,* 170 Pa. St., 323." *State ex rel. v. McQuillin,* 246 Mo., 692.

"One to whom the heir at law has sold the estate descended has an 'interest in the probate' of a will making a different distribution of the property; for it is not merely persons who have a legal interest in the estate of the decedent, but those who have a legal interest to be affected by the probate of his will, that are let in to contest the probate. Where an interest would descend to an heir at law, but for a valid will making a different disposition, such heir undoubtedly is interested in the proceedings to probate such will. If he has sold and conveyed his title, his vendee then has the same 'interest' that he had in the probate proceedings. *Davies v. Leete, supra.* If the heir's creditor obtain a valid lien on the heir's interest by levy of an execution or attachment, he stands in the same relation of interest as if the heir had voluntarily created the lien in his favor by mortgage or otherwise. *Watson v. Alderson,* 146 Mo., 333; 48 S. W., 478." *Brooks v. Paine's Exr., etc.,* 123 Ky., 276.

"The rights of a purchaser from an heir of a testator to resist the probating of his will has been conclusively settled by this Court. See the case of *Brooks v. Paine's Exr.,* 123 Ky., 271; 90 S. W., 600; 29 Ky. Law Rep., 699; *Davies v. Leete,* 111 Ky., 659; 64 S. W., 441; 23 Ky. Law Rep., 899, and the cases there cited. In the *Davies-Leete case,* this Court, discussing this question, said: 'The statutes use the words "persons interested" (secs. 4856, 4861, Ky. Stats., 1903) in defining who are proper or necessary parties to probate proceedings. We are of opinion that any person who claims title under any one an heir at law of the testator, as well, perhaps, as any creditor of such heir at law, if the heir be insolvent, may become a party to such proceedings under the above clause. This would not, of course, admit a stranger to testator's title, or one claiming under title hostile to his, to contest the will, in order that he might destroy a link in his adversary's chain of title (*Johnson v. Bard* (Ky.), 54 S. W., 721; 31 Ky. Law Rep., 999); nor could it admit any relation not an heir at law or such creditor.'" *Foster, etc., v. Jorden, etc.,* 130 Ky., 448.

It is also held, in *Bloor v. Platt,* 78 Ohio St., 49, and in 33 Mass., 265, that a creditor of the heir, who has acquired a lien, may caveat the will, the Court saying in the *Ohio case:*

"Construing all these enactments together, it seems clear to us that the expressions, 'any person interested,' 'a person interested in a will or codicil,' and 'other interested persons' are equivalent and may include persons other than the devisees, legatees, heirs, executors, and administrators of the testator. Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.' In this case the plaintiff had obtained a valid lien by levy on the property of the heir, at a time when the testatrix was supposed to have died intestate. There can be no doubt that such lien will prevail if this alleged lost will is set aside and found not to be the last will and testament of Charlotte Spice; and it is equally clear that if the probate of the will shall stand the plaintiff's lien will be defeated. The conclusion necessarily follows, that the plaintiff is a person interested, and therefore has legal capacity to prosecute this action."

We are, therefore, of opinion that whether guided by the rule of justice, reason, or authority, which are not always in harmony, the caveators should be allowed to contest the will as they are endeavoring to do.

Affirmed.

TOM BUTLER v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 26 November, 1919.)

1. **Telegraphs—Service Messages—Delay in Delivery—Negligence—Evidence—Sickness—Death—Mental Anguish.**

   A telegraph company failed to promptly transmit and deliver a message announcing the extreme illness of the plaintiff's brother residing about two miles from its terminal office, thirty-five miles from its initial office: and the evidence tends to show that the plaintiff, the sender of the message, had several conversations with the defendant's agent on the morning after the defendant had received it, and had been once, about noon, in the defendant's terminal office; that the message had been received for transmission about 9:30 one day and delivered about 5 p. m. the next, without evidence that defendant had sent back a service message or had searched for the plaintiff at its terminal office, and that as soon as he received the message the plaintiff immediately went to the place where his brother was, but arrived after the funeral. *Held*, sufficient to sustain a verdict of the jury upon the questions of whether, except for the defendant's negligence, the plaintiff would sooner have gone to his brother and have arrived before his death or burial.

2. **Telegraphs— Sickness— Death—Evidence—Presumptions—Near Relation—Damages—Contributory Negligence.**

   The presumption is that a person who receives a telegram announcing the extreme illness of his brother will make every reasonable effort to promptly go to him.

CIVIL ACTION, tried before *Harding, J.*, at March Term, 1919, of RANDOLPH, upon these issues:

"1. Did the defendant negligently fail to deliver the telegram to the plaintiff, as alleged? Answer: 'Yes.'

"2. What amount, if any, is the plaintiff entitled to recover of defendant by reason of the negligence of the defendant, as alleged? Answer: '$500.'"

C. H. Redding and Brittain & Brittain for plaintiff.
J. A. Spence for defendant.

BROWN, J. The action was brought by the plaintiff to recover damage from the defendant for its negligence in failing to deliver a telegram announcing the sickness of the brother of the plaintiff, and basing his claim for damage on the failure of the defendant to deliver the telegram in time for the plaintiff to reach the sick bed of his brother, Louis Butler, and be present at the funeral.

The motion to nonsuit was properly overruled. There is evidence tending to prove that the following telegram was delivered to the defendant between 9 and 9:30 a. m., 21 April, 1917, at Biscoe, N. C., for transmission to the plaintiff at Franklinsville, N. C.: "Come at once; Louis Butler is at the point of death. (Signed) Eliza Butler."

There is evidence that the defendant failed to deliver the said telegram until 5 o'clock p. m. the next day. It is in evidence that it is about 35 miles from Biscoe to Franklinsville, and that the plaintiff lived about two miles from Franklinsville. There is evidence that the plaintiff was in Franklinsville the morning of the 21st, and talked with the agent of the defendant; that the agent saw him twice at Mr. Allred's store; that the plaintiff was at the station where the telegraph office is, about 12 o'clock noon, and that he was in Franklinsville nearly all day. There is no evidence that the defendant sent a service message to the sender of the message that the plaintiff could not be found or gave the sender any opportunity for making provision for the delivery of the message to plaintiff's home. It is contended that there is no evidence that the plaintiff would have gone to see his brother if he had received the message in time.

The plaintiff testified that as soon as he received the message that he started, and got there Monday afternoon between sundown and dark. We think this is evidence sufficient to go to the jury as to what the plaintiff would have done had he received the message in due time.

Without reciting it particularly, we think there is evidence tending to prove that had the plaintiff received the message in due time he could have gone to his brother's residence and been with him before his death, and certainly in time to attend to his funeral; besides, the presumption is that when a person receives a telegram announcing the sickness and impending death of a very near relative, within such a short distance, that he will make every reasonable effort to go to his relative.

There is no evidence that the agent of the defendant at Franklinsville searched for the plaintiff in Franklinsville that day, although he knew he was there, or that any effort was made to deliver the message.

We see no evidence that the plaintiff did not use due diligence to reach his brother after he received the telegram or was in any way negligent himself.

Medlin v. Tel. Co., 169 N. C., 495; *Hospital Asso. v. Hobbs,* 153 N. C., 188.

Upon an examination of the entire record we think the case was fairly put to the jury, and we find

No error.

NORTH CAROLINA PUBLIC SERVICE COMPANY v. YADKIN FINISHING COMPANY.

(Filed 26 November, 1919.)

Contracts—Corporation Commission—Orders—Increase of Price—Municipal Corporations—Cities and Towns—Corporations.

The plaintiff gas company entered into a contract with defendant, a corporation engaged in finishing cotton fabrics, for the supply of gas at a certain schedule of rates, based upon actual consumption, which was approved by the State Corporation Commission, and, later, the Corporation Commission, upon the petition of the plaintiff, raised the rates relative to a certain town beyond the limits of which the defendant carried on its business, which were not subject to the ordinance or the governmental control of the town in any respect. *Held*, reading the order of the commission in connection with the petition, the order did not authorize the plaintiff to increase its rates of charges to the defendant, and the right of the commission to make a valid order increasing the rates above those specified in defendant's contract is not involved in the adjudication of the case.

HOKE, J., concurs in the result.

CONTROVERSY without action, submitted before *Harding, J.*, at March Term, 1919, of ROWAN.

1. That the North Carolina Public Service Company is a corporation duly created, organized, and existing under and by virtue of the laws of the State of North Carolina, and as lessee of the Salisbury & Spencer Railway Company, is engaged as a public-service corporation in furnishing gas for fuel and lighting in the city of Salisbury, N. C., maintaining its only plant, office, and place of business in said city.

2. That the Yadkin Finishing Company is a corporation created, organized, and existing under the laws of the State of North Carolina, and is engaged in the business of finishing cotton fabrics at its plant about 6 miles north of Salisbury, N. C., and outside of any incorporated town.

3. That on or about 20 September, 1916, the plaintiff and defendant entered into a written contract, a copy of which is hereto attached, and made a part hereof, by the terms of which the plaintiff, for a period of five years thereafter, contracted and agreed to furnish the defendant gas for fuel and lighting at the following rates, subject to a minimum monthly charge of $100, to wit: $1.35 net, or $1.45 gross, per 1,000 cubic feet for the first 10,000 cubic feet per month; $1 net, or $1.10 gross, per 1,000 cubic feet for the next 15,000 cubic feet per month; 75 cents net, or 85 cents gross, per 1,000 cubic feet for the next 25,000 cubic feet per month; 60 cents net, or 70 cents gross, per 1,000 cubic feet for all over 50,000 cubic feet per month.

Which said schedule of rates were in effect and existence in the city of Salisbury at the time, by and with the approval and by the authority of the Corporation Commission of North Carolina.

4. That thereafter the plaintiff filed its petition for authority to increase gas rates in the city of Salisbury with Corporation Commission of the State of North Carolina, and on or about 8 November, 1918, said Corporation Commission granted the petition of the said North Carolina Public Service Company.

5. That during the month of January, 1919, the defendant consumed 141,000 cubic feet of gas, and during the month of February, 1919, consumed 95,400 cubic feet of gas.

6. That under the schedule of rates authorized and permitted by the Corporation Commission of the State of North Carolina, the defendant is indebted to the plaintiff for gas consumed during the month of January, 1919, in the sum of $141.02, and for gas consumed during the month of February, 1919, in the sum of $107.88, or a total of $248.90.

7. That under the schedule of rates set out in the written contract entered into between the plaintiff and defendant on or about 20 September, 1916, the defendant is indebted to the plaintiff for gas consumed during the month of January, 1919, in the sum of $116.02, and for gas consumed during the month of February, 1919, in the sum of $100, or a total of $216.02.

8. The plaintiff contends that the order of the Corporation Commission of the State of North Carolina, in effect, abrogates in the matter of rates charged, the written contract entered into by and between the plaintiff and defendant, and that it is authorized and permitted as a matter of law to adopt the schedule of rates established by order of said Corporation Commission. The defendant contends the written contract is binding upon both plaintiff and defendant, and that the said Corporation Commission has not lawful authority by its order, or otherwise, to alter, amend or revise the schedule of rates set out in said contract, or by its order to alter or vary said contract in any particular.

The judge held that the plaintiff could only recover the contract rates for gas furnished, and that order of the Corporation Commission did not authorize them to abrogate the said contract, and gave judgment in favor of the plaintiff against the defendant for the sum due under the contract. Plaintiff excepted, and appealed.

Linn & Linn for plaintiff.
W. H. Woodson for defendant.

BROWN, J. The question as to whether or not the Corporation Commission had power to authorize the plaintiff to charge a higher rate to the plaintiff than the contract price, and that the rates allowed by the commission supersedes the rates fixed in the contract, was very ably argued before us by the counsel on both sides. But we are of opinion that the question is not presented upon this record, for we agree with the counsel for the defendant that there is nothing in the order of the commission which gives authority to the plaintiff to increase its rates outside of the city of Salisbury. The defendant is located six miles north of the city of Salisbury, and has no connection with that city, and is not controlled by any of its ordinances or regulations. The application to increase gas rates by the fourth section of the petition is specifically confined to the city of Salisbury. The order granted in pursuance of said petition, read in connection with it, fixes the rates which the plaintiff is allowed to charge in the corporate limits of the city of Salisbury, and nowhere else.

For this reason we are precluded from passing upon the interesting question so ably presented.

Affirmed.

HOKE, J., concurs in result.

HUTTON & BOURBONNAIS COMPANY v. WOOD HORTON, LARKIN HORTON, CHARLIE HORTON, AND ROBERT WELCH.

(Filed 26 November, 1919.)

1. **Estates—Deeds and Conveyances—Remainders—Intent—Children—Rule in Shelley's Case.**

   In order to effectuate the intention of the grantor as gathered from the terms employed in his deed to lands, it is *Held*, that by a conveyance thereof "to the use of the party of the second part for the term of his natural life, and from and after the termination of his estate, then to all his children born or to be born, and their heirs forever," a life estate was granted with remainder to the children "born or to be born," of the first taker, the word "children" not being in the sense of heirs, and the rule in *Shelley's case* does not apply.

2. **Estoppel—Judgments—In Pais—Partition—Estates—Remainders.**

   Where under a mistake of law the life tenant and remaindermen join in proceedings to partition lands among themselves as tenants in common, the parties thereto are estopped by the judgment therein to set up their title against a purchaser at the sale; and one not a party thereto is estopped *in pais* by his conduct in having been employed as a chain bearer in making the survey of the separate portions of the land, pointing out to the purchaser the part he was buying, and without asserting his own title thereto.

3. **Deeds and Conveyances—Probate—Judicial Sales—Title—Equity.**

Objection to the probate and registration of a deed made under order of court, that therein the commissioners to sell were not sufficiently identified, the defect may be cured by a later probate of the clerk of the Superior Court; and where the record of the proceedings identify the commissioners, the purchaser acquires an equitable title, which he may enforce in his action.

4. **Issues—Trespass.**

In an action of trespass on lands, an issue is sufficient which has afforded the excepting party an opportunity of having the jury assess any damages for any trespass that the opposing party may have unlawfully committed.

5. **Actions—Counterclaims—Subject-matter.**

In an action involving title to lands, the defendant may not set up, as a counterclaim, alleged acts of trespass on other of his lands, the subject-matter of the counterclaim being different from and not connected with the cause being tried.

CIVIL ACTION for trespass upon a certain tract of land, tried before *Long, J.*, at May Term, 1919, of CALDWELL, upon these issues:

"1. Is the defendant, Wood Horton, estopped by the record in Wilkes Superior Court from claiming title to the 95-acre tract described in the complaint? Answer: 'Yes.'

"2. Are the defendants, Wood Horton and Larkin Horton, estopped from claiming title to the 95-acre tract by reason of their representation and conduct? Answer: 'Yes.'

"3. Are the plaintiffs owners of the 95-acre tract described in the complaint, or any part thereof? If so, what part? Answer: 'All.'

"4. Have the defendants trespassed upon the 95-acre tract? Answer: 'Yes.'

"If so, what damages have plaintiffs sustained by reason of the said trespass? Answer: 'One cent.'

"6. Did the plaintiff trespass upon any lands belonging to the defendants embraced in the 95-acre tract and cut and remove timber therefrom? Answer: 'No.'

"7. If so, what damages has the defendant sustained by reason of said trespass? Answer: 'Nothing.'"

From judgment rendered the defendants appealed.

Council & Yount and Mark Squires for plaintiff.

W. C. Newland, R. N. Hackett, and Charles G. Gilreath for defendants.

BROWN, J. It is admitted that David E. Horton, prior to 12 October, 1866, owned all the lands in controversy in fee simple. On said date he Executed a deed to David L. Horton, containing the following clause:

"To the said party of the first part for the term of their natural lives, and the life of the survivor, remainder, after the death of the survivor, to the use of the party of the second part, for the term of his natural life, and from and after termination of his estate, then to all his children born or to be born, and their heirs forever."

David L. Horton died about five years ago, having had seven children born to him, to wit: J. W. Horton, called Wood Horton; Charlie and Larkin Horton (these three are defendants in this action), Julia, Mary Lou (yet living), Tillman, and Sallie, who are now dead.

Prior to the death of David L. Horton, and on 22 September, 1902, he, together with his brothers and sisters who were then living, together with the children of a dead sister, and his son, Wood Horton (J. W. Horton in the petition), and G. W. Bradley, filed a petition in the Superior Court of Wilkes County asking for a sale for partition of certain lands lying in Wilkes and Caldwell counties, including the lands described in the complaint, designated in the petition as the first tract. The petition set forth the interests of each party in said lands, and embraced the tract of land containing 95 acres, more or less, described in the complaint. The petition set forth the interest of Wood Horton and G. W. Bradley as one-twelfth each of the fifth tract bought from David L. Horton, which fifth tract is not connected with this action, but the defendant, Wood Horton, although a party to the said special proceedings, did not then contest the title to the said 95 acres described in the petition and being the land in controversy.

The land was purchased by plaintiff and T. B. Finley and F. B. Hendren, the commissioners appointed to sell the land, were directed to execute a deed therefor to the plaintiff.

The defendants excepted to the ruling of the court that the deed from David E. Horton to David L. Horton conveyed an estate in fee. If that ruling is correct, then the plaintiffs would be entitled to recover the whole of the land described in the complaint, and the finding of the jury under the third issue as instructed by the court would be correct.

We are of opinion, however, that under the decisions of this Court, the rule in *Shelley's case* does not apply, and that David L. Horton took only a life estate with the remainder to his children. In the clause in the deed the intent of the grantor, we think, is plainly manifest; after reserving a life estate, to convey the land to David L. Horton for the term of his natural life, and then in specific language, after the termination of the life estate, then to all of David L. Horton's children, born or to be born, and their heirs forever. It is plain that the word "children" is not used in the sense of heirs. *Jones v. Whichard*, 163 N. C., 243; *Powell v. Powell*, 168 N. C., 561; *Williams v. Williams*, 175 N. C., 163.

While the trend of the courts indicate an undoubted tendency of the judicial mind to follow the intention of the grantor, and whenever he means to limit an estate to the heirs of the life tenant an estate of inheritance will vest in the tenant for life, but that intention must be manifest that he intended to convey an estate which would vest in the grantee's heirs. In the deed under consideration the intention is manifested in express words to limit the estate of the grantee to the term of his natural life, and then to convey the property in fee to all the children born, or thereafter to be born.

We think, however, that his Honor's ruling is correct that the defendant, Wood Horton, is estopped by the record of the special proceeding in Wilkes Superior Court from claiming title to the 95-acre tract described in the complaint.

It is true, as claimed by the defendant, that the petition sets forth the interest of each party in the lands described therein, and alleged the interest of Wood Horton to be one-twelfth of the fifth tract of land bought from David L. Horton, which tract is not in controversy in this action. But Wood Horton was a party to that proceeding, and had an opportunity to assert his title to the lands described in the petition, and especially to the 95 acres now in controversy. He made no claim to it and it was put up and sold under the judgment of the court, and Wood Horton is bound by it. *Weston v. Lumber Co.,* 162 N. C., 180; 169 N. C., 398; *Propst v. Caldwell,* 172 N. C., 596. The defendants excepted to the submission of the second issue and the ruling of the court thereon. This relates to the estoppel *in pais* pleaded against the defendants, Wood Horton and Larkin Horton.

The petition in the special proceeding under which the lands claimed by the plaintiff were sold, asked for the appointment of a surveyor to survey and locate the lands, the survey was made and the lands located as sold to the plaintiff. Larkin Horton was one of the chain bearers when this land was surveyed and located under the special proceedings, and the cost of the survey, including the amount due him as chain bearer, was paid out of the sale of the lands.

The witness, T. H. Broyhill, testified that these two defendants showed him around the lands and pointed out the lines from papers and grants they had at the time, and as the lands so pointed out were the lands claimed by the plaintiff, and in pursuance of what they said to him he bought it. In his charge on this issue his Honor simply stated the contentions of the parties and defined an estoppel of this kind, and left it to the jury to find the fact and answer the issue accordingly. They answered the issue in favor of the plaintiff. The defendants excepted to the ruling of the court upon the sufficiency of the deed from Finley and Hendren, commissioners. It appears that T. B. Finley and F. B.

Hendren sold the land in controversy to the plaintiffs at public sale, which was duly confirmed, and executed a deed therefor in the name of Finley and Hendren, commissioners, which was first recorded in 1906, and again in 1918, prior to the trial. The defendant's exception relates to the 1906 probate and registration, which, if defective, was cured, we think, by the 1918 probate and registration, to which no objection is made and no exception taken, except as to the names of Finley and Hendren.

The probate to the deed is as follows:

North Carolina—Wilkes County.

I, C. H. Somers, clerk of the Superior Court of Wilkes County, North Carolina, do hereby certify that T. B. Finley and F. B. Hendren, attorneys at law, practicing under the firm name and style of "Finley & Hendren," being the same persons by whom the foregoing deed was executed, as commissioners, personally appeared before me this day and acknowledged the due execution by them of the foregoing deed as such commissioners. And I do further certify that I was clerk of the Superior Court on 15 May, 1906, and prior thereto, and do here now find as a fact that the said T. B. Finley and F. B. Hendren were the identical persons appointed by me as commissioners in the special proceeding referred to in the said foregoing deed. Let the instrument and certificate be registered.

Witness my hand and official seal of office, this 28 November, A. D. 1918.

C. H. SOMERS,
Clerk Superior Court, Wilkes County.

The report of the sale is made in the name of and by Finley & Hendren, commissioners. The final decree states that, "This matter coming on to be heard upon the report of Finley & Hendren, commissioners, appointed to sell lands described in the petition, it is ordered that the said commissioners make and deliver a deed to Hutton & Bourbonnais for said lands."

A seal in behalf of the commissioners is attached to the original deed.

We think the identity of the commissioners executing the deed as T. B. Finley and F. B. Hendren, who were appointed as such, is fully established by the evidence introduced on the trial, as well as by the certificate of the clerk on the second registration of the deed. In any view of the matter, this deed, taken in connection with the special proceeding record, conveys to the plaintiff such an equitable title as would enable it to maintain an action for the land. *Institute v. Norwood*, 45 N. C., 65; *Simmons v. Allison,* 118 N. C., 763; *Daniels v. R. R.,* 158 N. C., 427.

The exception to the issues cannot be sustained.

The issues submitted afforded the defendants the opportunity to have the jury pass upon any claim they might have to any portion of the land claimed by plaintiff, as well as the opportunity of having the jury assess any damages for any trespass that the plaintiff might have unlawfully made on said land. *Kirk v. R. R.,* 97 N. C., 82; *McAdoo v. R. R.,* 105 N. C., 140; *Paper Co. v. Chronicle,* 115 N. C., 147.

The defendants, in their answer under the head of new matter, and by way of counterclaim, attempted to set up a claim for damages for an alleged trespass at different times on lands outside of the 95 acres claimed by plaintiff, which counterclaim, on objection by plaintiff, was excluded by the court from the consideration of the jury on the ground that it did not arise out of the cause of action on which the plaintiff based its action, and on account of the fact that there was no sufficient evidence to establish such a claim.

There was no evidence of the cutting of timber on any lands except those in dispute, but if there was a trespass on other lands, that would not be a cause of action arising out of the transaction that is the subject of the complaint. The plaintiff's action was to try title to a 95-acre tract described in the complaint. The trespass, if any, that the plaintiff committed on other lands, not in controversy, claimed by defendants, had no connection with the title to the lands put in issue in the complaint. This matter was not connected in any way with the cause of action set out in the complaint, and the demurrer was properly sustained. *Bazemore v. Bridges,* 105 N. C., 191; *Smith v. Young,* 109 N. C., 224; *Street v. Andrews,* 115 N. C., 417.

Upon a careful review of the entire record, we find no error committed as to the defendants Wood Horton and Larkin Horton. As to the defendant Charlie Horton, who was not a party to the special proceeding, and is not estopped in any way so far as the record discloses, we think the plaintiff failed to make out title as to him. The action is dismissed as to Charlie Horton and Robert Welch, who will recover their costs against plaintiff in the Supreme and Superior Courts. As to Wood Horton and Larkin Horton, the judgment is

Modified and affirmed.

A. A. SIDES ET AL. v. C. E. SIDES ET AL.

(Filed 26 November, 1919.)

Wills—Devise—Residence at Home Place—Waiver—Estates—Determinable Estates—Alternative Rights.

A testator, among other things, devised the place upon which he had resided to his children as long as they remain single as a "common home for them all, but if any of them shall marry, then they, the married ones, shall look out for some other place"; and, later in the will, "that the home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then to be divided between the next of kin." The single members of the family signified that they did not choose to reside at the home place by a petition to the court to that effect, and asked that the property be divided according to the terms of the will. *Held*, the words "if they choose to do so" referred to the residence of the single children at the "home place," which they could waive or abandon by asking the court to divide the same according to the provision of the will, all the children, in that event, being tenants in common, with the right of partition. *Semble*, such children, if holding a determinable life estate, could choose this course as an alternative right under the will.

SPECIAL PROCEEDING for the partition of lands by a sale thereof, heard on appeal from the clerk of the court, by *Adams, J.*, at October Term, 1919, of IREDELL.

The matter was heard in the court below upon an agreed case, and the following statement of facts will sufficiently explain the controversy:

In 1881 Daniel Sides died, leaving a last will and testament. He left surviving him nine children and two children of a deceased son. One of the surviving children of Daniel Sides was a married son, J. W. Sides, and another a widowed daughter, Adeline Lewis, who had three children, N. A. Lewis, Prudie Lewis, and John B. Lewis. John B. Lewis is now dead, leaving three children, J. G. Lewis, H. E. Lewis, and R. B. Lewis. The remaining children of Daniel Sides were unmarried at the time of his death, and one of them afterwards married.

Since the death of Daniel Sides, his married son, J. W. Sides, has died, leaving children, and Adeline Lewis has died intestate, leaving two children, and the children of her deceased son. Four of the remaining children of Daniel Sides have also died, never having married. The children of Daniel Sides now living are A. A. Sides, Elvina Sides, and M. S. Sides, three of the plaintiffs in this case.

Daniel Sides died seized and possessed of three tracts of land, set out and described in the petition, said tracts being known and designated as follows, viz.: First, the Reuben Potts Place; second, the River Place; third, the Home Place.

There is no contention between the parties concerning the decision of the court as to the "Potts Place" and the "River Place." The contention is over the "Home Place." In the will of Daniel Sides he provides in one item of his will as follows:

"Item, I further devise that as long as the children remain single, the place where I now reside shall be a common home for them all, but if any of them shall marry, then they, the married ones, shall look out for some other place."

The will later provides as follows:

"Item, I further devise that after the death of my wife, Esther Sides, all my lands except the home place shall be equally divided between my children living at my death, by a commission consisting of three disinterested men, and then each child's lot shall be determined by drawing for it; and the home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then be divided between the next of kin."

The surviving children, A. A. Sides, Elvina Sides, and M. S. Sides, have come into court and stated that they do not longer care to maintain said home as a common home, but desire to hold their interests in said property in severalty. In this request a number of the heirs at law of Daniel Sides concur.

The clerk of the Superior Court ordered the home place to be sold, and the proceeds divided among the next of kin of Daniel Sides at the time of his death. From this judgment the defendants appealed to the Superior Court, which court rendered judgment dismissing the petition for partition of the "Home Place," containing 211 acres, holding that the same was premature, and that the plaintiffs, A. A. Sides, Elvina Sides, and M. S. Sides, had no right to give up said "Home Place" as a common home, and call for a division of the same, and plaintiffs appealed.

Dorman Thompson for plaintiffs.
R. B. McLaughlin and W. D. Turner for defendants.

WALKER, J., after stating the case: We need consider but one question, that is, whether the plaintiffs were entitled to partition of the "Home Place." The other questions will be presented when the land is divided or sold for partition, the report of the commissioners is confirmed and directions are given for a distribution of the fund among those entitled to it. The court will then determine how the proceeds of the sale shall be divided in accordance with the terms of the will.

It appears that the testator desired the "Home Place" to be kept for the single members of his family as long as they desired to live together.

He therefore directed that if any should marry, at once a new home should be found. He realized, however, that the time might come when the single members of the family would no longer care to keep the old home in common with each other, and he at once set about to provide for such a contingency. He says in an item of the will, "And the home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then be divided between the next of kin." It is manifest that the words, "if they choose to do so," must mean that it shall be kept as a home if the single members so choose. If not, "then" it shall be so divided. No other meaning, we think, can be reasonably attached to these words.

The single members of the family, by petition, show the court that they no longer desire to retain this home. They do not "choose to do so." They ask that the court proceed to do, as the testator provided, that is, to divide the land between the next of kin.

The contention of the defendants that the words, "if they choose to do so," means if they, the single members of the family choose to remain single, is a construction not sustained by the language of the will. The testator provided in the first item, relating to the "Home Place," that if any of the family married a new home should be found, and there is no reason why he should say anything further as to this. It could not mean, if any of them chose not to remain single any longer, because such an event had already been fully provided for. It did occur to him, however, that the single members might not wish to occupy the place as their home. If this should happen, he then provided for its division.

The contention of the defendants that the single members cannot give up the home, and that no division of the estate can take place until after the death of the sons and daughters now living, is without merit. If this be true, and all members of the family should have married, then the "Home Place" might remain unoccupied and unused for the remainder of the lives of the sons and daughters. This would lead to a result the testator evidently did not contemplate. The facts show that, at the time of his death, Daniel Sides had four unmarried daughters. Evidently it was his purpose that they should never be forced to leave home. But if they chose to live elsewhere, then he wanted the place divided among those entitled to it under the will. If this be not true, then what would become of the place if it be abandoned by the single members of the family, and they should seek a home elsewhere?

The position of the defendants that this land cannot be divided because the single members have in it a determinable life estate is also without merit. Let it be granted, for the sake of argument, that land cannot be sold for partition when burdened with a determinable life estate, if the life tenant asks for the value of his estate, because there is no way to ascertain the value of the life estate. There is nothing, however, to prevent the life tenant from surrendering all his rights in his life estate, and asking that the property go immediately to the remaindermen, and thereby take his alternative rights under the will. In this case, the owners of the life estate come into court and ask that the land be partitioned among the remaindermen as directed by the will.

The case of *Watts v. Griffin,* 137 N. C., 572, sustains the view we have taken. There we held that while the parties could not convey during their minority an indefeasible estate, they might waive their right to the "home place" and convey a good title to it, after they had become *sui juris.* In *Ex parte Watts,* 130 N. C., 237 (same will), the Court had said: "We do not mean to say that the children, or any of them, are required to live in the house. Nor are we passing upon the effect of a joint deed executed by all the children after they become *sui juris.*" And in *Watts v. Griffin, supra,* we said, upon the same subject, at p. 576: "We think it is clear that the testatrix gave the house and lot to her children for the purpose of advancing their interests in life by providing them and each of them with a home in the event that one was needed, and she also intended in furtherance of this design that the land should not be conveyed or disposed of without the consent of all the devisees. Each one was at all times to have access in the house and lot for the purpose of using them as a home, and could not be deprived of this right, either directly or indirectly, nor be affected by the act of any of the others which would be calculated to interfere with or impair the full enjoyment of the right, in a few words, she did not intend that any of her children should become homeless. . . . It is quite sufficient for us to declare, as we do, that it was not intended by the testatrix, if all her children should think it best for them to part with the homestead, so that each could buy a separate home for himself or herself, that they should be prohibited from doing so. Such a construction might produce dissension and strife in the family, something that we can well see she neither contemplated nor desired. Giving to each one a veto power, it was left to all of them, if they could come to an agreement, to do with the property just as they pleased, and as they might think would promote their interests, their happiness and welfare evidently being the paramount intent of the donor."

We deem it clear that the testator, by the clause of the will under consideration, intended to confer upon his unmarried children the right to occupy the place as their home, but he did not mean that they should be compelled to live there, if they did not desire to do so, and preferred another home for themselves. It was a mere right or privilege, which could be waived or relinquished by them, if they had rather enjoy their share of the property in severalty. If they surrendered this right, it would leave the parties entitled to the property, under the will, as tenants in common and give them the right of partition.

The decision of the court was erroneous, and is reversed, with directions to proceed further in the case as the law provides.

Error.

E. B. CAPPS, ADMINISTRATOR OF I. M. WILLIAMSON, v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 December, 1919.)

1. **Railroads—Commerce—Statutes—Federal Employer's Liability Act—Employer and Employee—Master and Servant—Personal Injury.**

   The purpose and design of the Federal Employer's Liability Act is to regulate suits for physical injuries or death of employees of railroad companies, while engaged as common carriers of interstate commerce, wrongfully caused by the negligence of the officers, agents, or employees of such carriers, or by reason of negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, bolts, wharves, or other equipment, and, when applicable, affords the controlling and exclusive rule of liability, requiring that both the carrier and the employee be engaged in interstate commerce, the latter being employed in the particular service as a part of interstate commerce, at the time of the injury, or in aid thereof, or so nearly related to it as to be practically a part of it.

2. **Same—Courts—Jurisdiction—Motions—Evidence—Nonsuits—Trials.**

   A carpenter, employed by a railroad company in repairing a chute within a State for the supply of coal to its interstate and intrastate trains, is not engaged in interstate commerce within the intent and meaning of the Federal Employer's Liability Act, and his suit under the act to recover damages for a personal injury thus occurring, alleged to have been caused by the railroad's negligence, brought in the State courts, will, on motion for judgment as of nonsuit, be dismissed.

CLARK, C. J., concurring.

CIVIL ACTION, tried before *Bond, J.*, at February Term, 1919, of WILSON, to recover damages for alleged negligent killing of plaintiff's intestate.

The plaintiff sues, and insists on his right to recover, under the Federal Employer's Liability Act, and it is admitted that defendant company at the time was a railroad corporation engaged as a common carrier in transporting inter- and intrastate commerce. There were also facts in evidence tending to show that at the time of the killing, August, 1915, intestate was a member of a carpenter force in the employment of the defendant company, and as such was engaged in repairing a coal chute of defendant situated in the city of Richmond, Va., one of defendant's principal terminals, when the steps leading up on the chute gave way, causing intestate to fall 30 to 40 feet, and resulting in fatal injuries, from which he soon thereafter died. The intestate, and the force with which he was at work, had been nailing plank on the body of the chute, the better to hold in the coal, and that at the precise time of the injury, as we understand the evidence, were replacing a defective stringer in the upper flight of the steps leading up on the chute. This coal chute was a large wooden structure used for storing or holding coal to be supplied to defendant's trains, some of which were engaged in transporting interstate and others intrastate passengers and freight, etc. There was also testimony tending to establish culpable negligence on the part of defendant—the proximate cause of the killing.

At the close of the testimony, the court, assuming the existence of facts tending to show negligence on the part of defendant, on motion, entered judgment of nonsuit and for the reason that the facts did not justify a recovery under the Federal statute on which the plaintiff bases his claim. Thereupon, plaintiff having duly excepted, appealed.

O. P. Dickinson, Manning & Kitchin, and James H. Pou for plaintiff.
F. S. Spruill and Carl H. Davis for defendant.

HOKE, J., after stating the case: The Federal Employer's Liability Act, Federal Statutes Anno. 1909, Supp., p. 584, is designed and purports to regulate suits for physical injuries or death of employees of railroad companies, while engaged as common carriers of interstate commerce, wrongfully caused by the negligence of the officers, agents, or employees of such carriers, or by reason of negligence in its cars, engines, appliances, machinery, track, roadbed, works, bolts, wharves, or other equipment. It is now well established that this statute, when the same applies, affords the controlling and exclusive rule of liability in these cases, and authoritative decisions construing the same are to the effect that in order to its proper application both the carrier and the employee must be engaged in interstate commerce, and in reference to the latter, in a more recent case, the position is stated with approval as follows: "As to the employee the act applies where the particular service in which he is employed at the time of the injury is a part of interstate commerce." *Ill. Cen. Ry. v. Behrens,* 233 U. S., 473; *Pendersen v. D. L. & W. R. R.,* 229 U. S., 146; *Belch v. R. R.,* 176 N. C., 22, and authorities cited.

The cases on the subject hold further that the service of the employee should be properly considered a part of interstate commerce when his act at the time of the injury "was in aid of interstate transportation or so nearly related to it as to be practically a part of it." *Philadelphia, etc., Ry. v. Smith,* current Supreme Court Reporter U. S., p. 397; *Kinzell v. Chicago, etc., Ry.,* advance opinion S. C., p. 477; *Erie, etc., Ry. v.*

Winfried, 244 U. S., p. 174; *So. Ry. v. Puckett,* 244 U. S., p. 570; *Receivers North Texas, etc., Ry. v. Rosenbaum,* 240 U. S., 439. These and other like decisions being in approval and illustration of the *Pendersen case, supra,* where it was determined that the act applied where the injured employee was engaged in carrying bolts to be used in the repairs of a bridge then being made; the bridge being within the confines of a State, but used by the company for both inter- and instrastate commerce, this, on the ground that as the bridge was itself an instrumentality of interstate transportation, the act of repairing it was necessarily one in aid of such transportation.

On the other hand, it was held in the case of *Shanks v. Del., etc., Ry.,* 239 U. S., 556, that where an employee in a machine shop of a railroad company engaged in intra- and interstate transportation was injured in taking down and putting up fixtures in the shop where engines engaged in such transportation were being repaired, could not maintain an action under the statute. And applying the principle to the subject of coal as an agency of transportation, it has been held, in *Del., etc., Ry. v. Yukonis,* 238 U. S., 439, that an employee of the carrier engaged in mining coal for use in interstate locomotives was not engaged in interstate commerce within the meaning of the Federal act. And in *Chicago, etc., Ry. v. Harrington,* 241 U. S., 177, that the statute was not applicable where the employee of the company was injured while engaged in removing coal from storage tracks where it had remained for some time to the company's coal sheds or chutes to be used in interstate hauls. And a similar ruling was made in *Lehigh Valley R. R. v. Barlow,* 244 U. S., 183. In the last case the injury seems to have been received on the unloading trestle in the yards of the company. Again, in *Kelly v. Pa. R. R.,* 238 Fed., 95, it was held by the Circuit Court of Appeals on third circuit that a plaintiff's cause was not within the statute when he, a foreman of a carpenter squad engaged in work of the company, had gone with some of his hands to do repair work on a roundhouse and coal chute, these structures being used for both classes of transportation, one of his men had been sent up on the roundhouse when plaintiff went to a signal tower near to procure material required for the repairs, and was run over and killed by a train on his way back to his work.

And in the very recent case of *New York Central Ry. v. Gallagher, Guardian,* 248 U. S., 559, a petition for *certiorari* was denied in a suit where an employee of a company engaged in transporting both kinds of commerce, was killed in repairing coal packets of the company from which coal was supplied from time to time to locomotives engaged in both inter- and intrastate commerce. That case originated on petition before the industrial commission of the State of New York, under a State statute for a claim on behalf of the infant dependent children of Daniel

T. Gearity, the deceased employee; the facts stated being to the effect that he came to his death from injuries received by a fall from a plank on which he was standing and engaged in cutting heads off bolts in the coal packet building, etc. The commission have allowed the claim, the cause was carried by appeal of the railroad company to the appellate division of the Supreme Court on the ground that as the facts disclosed a case under the Federal Employer's Liability Act, the proceeding under the State statute could not be maintained. The court ruled that the Federal act did not apply, and in sustaining the award of petitioner's claim, it was held that a carpenter in the general employ of a State railroad engaged in repairing coal pockets from which coal was supplied to engines of the company engaged in inter- and intrastate commerce, was not engaged in repairing an instrumentality of interstate commerce, so as to prevent the application of the State statute, etc., 180 N. Y. Appellate Division Supreme Court, page 88. This ruling was affirmed by the Court of Appeal (222 N. Y., 649), a petition for *certiorari* to the Supreme Court of the United States setting forth that the facts brought the cause within the provisions of the Federal Employer's Liability Act was denied as stated.

True, the action of the Supreme Court on these petitions for *certiorari* is not always necessarily intended to be controlling as a precedent, the exercise of revising power of the Court in this manner being to some extent discretionary (*Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S., 251; *Forsyth v. Hammond*, 166 U. S., 514, 515); but on a judgment making final disposition of the cause, and where the petition for *certiorari* directly challenged the right of the State board to allow the claim, on the ground that the Federal statute was controlling in the matter, it is the reasonable and well nigh the necessary inference that the Supreme Court of the United States intended to affirm the ruling of the New York Court that the act of the deceased employee was not one in aid of interstate commerce. From these decisions we conclude that coal as an agency of interstate transportation does not become such until it is supplied, or in the act of being supplied, to engines or trains engaged at the time in carrying interstate commerce, and that the making of repairs on a chute or structure where it is stored for the purpose of being supplied to inter- and intrastate engines as called for is not such an act in aid of interstate transportation as to bring an injured employee's cause within the provisions of the Federal statute, the same being too remote.

The case of *B. & O. R. R. v. Branson*, 242 U. S., 623, reversing a decision of the State Court in which recovery had been awarded under the Federal act, and two decisions in the State Court where relief under the act was denied, *Zavitocki's Administrator v. Chicago Ry.*, 161 Wis., 461, and case of *Grand Trunk Ry.*, reported in 100, at p. 908, are in general approval of the position.

The plaintiff, who is insisting on his right of recovery under the Federal statute, having failed to bring his case within its provisions, has been properly nonsuited and the judgment of the Superior Court to that effect is affirmed. *S. Louis, etc., Ry. v. Seal*, 229 U. S., 156; *Belch v. R. R.*, 176 N. C., 22.

Affirmed.

CLARK, C. J., concurring: The line between the acts of an employee done in interstate commerce and those which are done in intrastate commerce is not always easy to define. But that line has never been "run, marked, and chopped" more definitely probably than in the opinion of *Mr. Justice Hoke* in this case.

The distinction seems to be this, that when the act of the employee is in the aid of *operating* in interstate commerce, then the employee is in interstate service; but when he is doing an act which is not in the direct aid of the *operation* of interstate traffic, then it is not. Otherwise, if a railroad company should build a warehouse, or a station, or other building, or do other work for the general use of the road, then the employee would be engaged in interstate commerce, which would take in all the employees of these corporations.

The cases cited in the opinion of *Judge Hoke* seems to bear out this distinction. The case of *Pendersen v. R. R.*, 229 U. S., 146, where the employee, when injured, was engaged in carrying bolts to be used in the repair of a bridge seems to be in conflict with the others cited, unless it can be explained upon the ground that the bridge on a railroad operating in two States is constantly being used in transportation, and, therefore, keeping it in repair is necessarily in aid of the *operation* of interstate commerce; whereas, removing coal from storage tracks, or burning coal for use of engines in interstate commerce, or putting up fixtures in the roundhouse where engines used in interstate commerce are being repaired, are not acts in the direct operation of interstate commerce, and hence employees injured in doing such acts cannot sue under the "Federal Employer's Liability Act."

In the *Pendersen case, supra*, three judges dissented, and the majority opinion held that the ruling would not apply if the bridge was being constructed, instead of being repaired.

W. T. BARNHARDT v. E. W. MORRISON.

(Filed 3 December, 1919.)

1. **Wills—Probate—Registration—Statutes—Amendments—Heirs at Law—Purchasers.**

Under Rev., 3139, prior to the amendment of chapter 219, Laws 1915, which became effective 9 March, 1915, there was no limitation as to the time when a will could be probated and recorded, the ordinary registration acts having no application to wills, and they becoming effective from the death of the testator, until the enactment of the later law, ordinarily passing the title to devises from that date against all dispositions or conveyances from the heirs to the contrary.

2. **Limitation of Actions—Adverse Possession—Remainders.**

The statute of limitations against the remaindermen does not begin to run until the falling in of the estate of the life tenant, and his possession is not adverse to the remainderman, within the terms of the statute.

3. **Wills— Probate— Registration— Statutes— Prospective Effect— Heirs—Purchasers.**

The owner of lands died intestate, her husband taking a life estate as tenant by the courtesy, leaving three children surviving. One of these died without issue surviving, or issue of such, and the other two acquired the life estate of their father and sold the same under proceeding to partition among themselves as tenants in common, unaware that their deceased sister had made a will devising her interest to her husband, who, under the provisions of Rev., 3139, did not have the will probated until after the sale for partition, of which he was not previously aware. *Held*, the statute gave him the legal right to have the will, under the circumstances, probated and recorded, and relate back as of the time of the death of the testatrix, his wife; and there being no evidence that he had misled any one by his declarations, acts, or conduct, there is nothing upon which the equitable principles of estoppel *in pais* would operate to deny his rights against the purchaser at the partition sale.

4. **Wills—Statutes—Probate—Heirs at Law—Purchasers—Devisees—Death of Testator—Prospective Effect.**

A statute will not be construed to have a retroactive effect to destroy an existing right given under a former statute unless the language thereof is clear and unmistakable; and construing chapter 219, Laws 1915, amendatory of Rev., 3139, under which unlimited time is given to probate and register a will, etc., that such probate and registration "shall not offset the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator," etc., it is *Held*, that the amendment is prospective in effect.

5. **Same—Limitation of Actions—Inadequate Time—Legislative Powers—Actions— Constitutional Law.**

Chapter 219, Laws 1915, amendatory of Rev., 3139, fixes the time as two years within which a will must be probated and recorded to affect the rights of purchasers from the heirs at law, and this limitation being exclusively within the authority of the Legislature to make, except where the time is manifestly inadequate, etc., it is held that the Laws of 1915, in order to give a devisee time to probate the will, allows two years in which to probate from the time of its enforcement.

CLARK, C. J., dissenting.

APPEAL by defendant from *Harding, J.*, at April Term, 1919, of CABARRUS.

This is a proceeding for the partition of lands, in which the plaintiff contends that he is the owner of a one-third interest as the devisee of his wife, Margaret Barnhardt, and that the defendant is the owner of a two-thirds interest as a purchaser from the two sisters of Margaret, Minnie, and Lula.

Margaret Ellis, Sr., was originally the owner of the land. She died intestate, leaving her surviving her husband, D. R. Ellis, who had a life estate in the land as tenant by the curtesy, and three daughters, as her only heirs, Margaret, who married the plaintiff, Minnie, unmarried, and Lula, who married J. P. Gibbs.

Mrs. Gibbs and Minnie Ellis bought the life estate of their father in 1895. Margaret died in 1898, leaving a will in which she devised her interest in the land to the plaintiff, but this will was not probated until 12 February, 1917. She left no children.

Neither of the sisters nor the defendant knew of this will, and after the death of Margaret the sisters divided the land, and in 1908 sold the same, including the life estate, to the defendant, who has been in possession since that time.

D. R. Ellis, the life tenant, died 11 April, 1917.

The plaintiff lived in ten or twelve miles of the land, but there is no evidence that he knew of the division of the lands or of the sale to the defendant.

This proceeding was commenced 14 September, 1917.

His Honor held that the plaintiff was the owner of one-third of the land, and rendered judgment accordingly, and the defendant excepted and appealed, contending that he is the sole owner of the land.

Maness & Armfield and A. H. Price for plaintiff.
L. T. Hartsell and J. L. Crowell for defendant.

ALLEN, J. Under the statute in force when the testatrix of the plaintiff died (Rev., 3139), and up to 1915, covering the period when the defendant bought the land in controversy, there was no limitation as to the time when a will could be probated and recorded (*Steadman v. Steadman*, 143 N. C., 345), the ordinary registration acts had no application to wills (*Harris v. Lumber Co.*, 147 N. C., 631; *Bell v. Couch*, 132

N. C., 346), and when probated and recorded, without regard to time, the will became effective from the death of the testator, passing the title from that date, and "avoiding all dispositions or conveyances from the heirs contrary to the provisions of the will," unless those claiming against the will were "protected by the statute of limitations or some recognized equitable principle." *Cooley v. Lee,* 170 N. C., 22.

In this case there is no statute of limitations which will perfect the title of the defendant by adverse possession, because he was the owner of the life estate of D. R. Ellis, who did not die until 11 April, 1917, and the possession of the life tenant is not adverse to the remainderman (*Norcum v. Savage,* 140 N. C., 474); nor can the defendant invoke the equitable principles of an estoppel *in pais,* upon which he relies, upon the evidence in this record.

"This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. . . . In order to constitute an equitable estoppel, there must exist a false representation or concealment of material facts, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge, or, having the means of knowledge of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice. 16 Cyc., 722; Eaton's Equity, p. 169. It is a species of fraud which forms the basis of the doctrine, and to prevent its consummation is its object." *Boddie v. Bond,* 154 N. C., 365.

"Mere silence will not work an estoppel. There must be some other element connected with the transaction and the silence to prevent a person from asserting his rights or claim. And so, in the many and varied situations in which this question can be raised, it is generally affirmed that in order to work an estoppel the silence must be under such circumstances that there are both a specific opportunity, and a real or apparent duty, to speak." 10 R. C. L., 692.

"Undoubtedly mere silence may sometimes be found an estoppel, but it must be when there is a duty and opportunity to speak, when silence either is or operates as a fraud to the consciousness of the party who does not speak, and when he knows or ought to know that some one is relying upon his silence and will be injured by that silence. (*Viele v. Judson,* 82 N. Y., 40.) In other words, the omission to speak must be, relatively to the party harmed, an actual or constructive fraud. (Herman on Estoppels, sec. 954)." *Collier v. Miller et al.,* 137 N. Y., 339.

There is no evidence that the plaintiff knew of the partition of the lands among the surviving sisters, or of the purchase by the defendant, nor is there any evidence of any act or declaration of the plaintiff calculated to mislead the defendant. He was merely silent, and withheld the will from probate in the exercise of a legal right, which gave him unlimited time within which to probate and record the will, and he was not required to speak.

The defendant says, however, he is protected by the amendment to section 3139 of the Revisal, which became effective 9 March, 1915 (chapter 219, Laws 1915), and is as follows: "*Provided,* that the probate and registration of any last will and testament shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless the said last will and testament has been fraudulently withheld from probate."

The contention of the defendant is that this amendment is retrospective in its operation, and as he bought from the heirs more than two years after the death of the testatrix, the amendatory statute had the effect of establishing his title against the plaintiff at the time of its enactment, or at most, the plaintiff could only have a reasonable time to probate the will, and that a delay until 12 February, 1917, when the will was probated, twenty-three months and three days after the adoption of the amendment, was unreasonable.

There is language in the proviso, such as "any last will," "is made," "has been," which give indication that it was intended to have a retroactive effect, but this construction ought not to be adopted, and thereby summarily destroy an existing right unless the language is clear and unmistakable.

"There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied." *United States v. Fidelity & Guaranty Co.*, 209 U. S., 306.

"A statute, upon obvious principles of convenience and justice, must in general be construed as prospective in its operation. It must be construed as intended to regulate the future conduct and rights of persons, and not apply to past transactions. This elementary rule of construction may be changed by the Legislature, but such intention must be sufficiently expressed by the statute." *Merwin v. Ballard,* 66 N. C., 399, approved in *Waddill v. Masten,* 172 N. C., 585.

A great number of cases are cited and commented on in support of the same principles in the notes. 4 A. and E. Ann. cases, 166; 1912 A. Ann. cases, 1041.

Again, if we should adopt the view of the defendant that the Legislature intended the proviso to operate retrospectively, as he had bought from the heirs more than two years after the death of the testatrix, he was at once protected against the claim of the plaintiff, and we would run counter to the principle "that while the statute of limitations affects the remedy only and takes away no vested rights, it is not competent for the Legislature to cut off the remedy entirely, as this would amount to a denial of justice." *Tipton v. Smythe,* 8 A. and E., Ann. cases, 525, and note, in which decisions from thirty-one States, and from the Supreme Court of the United States are cited in support of the text.

"It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his rights in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever be the purport of its provisions." *Wilson v. Iseminger,* 185 U. S., 55.

It is our duty, if possible, to avoid attributing to the General Assembly such an attempt to exercise arbitrary power and to deprive the plaintiff of his right without a hearing.

Mr. Cooley states the rule clearly and accurately as follows: "The duty of the Court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the Legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. . . . The rule upon this subject is thus stated by the Supreme Court of Illinois: 'Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the Courts. Therefore, acts of the Legislature, in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only; for, applied to, and operating upon, future acts and transactions only, they are rules of property under and subject to which the citizen acquires property rights, and are obnoxious to no constitutional limitation; but as retractive laws, they reach to and destroy *existing* rights, through force of the legislative will, without a hearing or judgment of law.'" Codley Const. Lim., 8th Ed., 255.

We therefore conclude that it was not the intention of the Legislature that the proviso should operate retrospectively, and deprive the plaintiff of the right to probate his will as of the time of its enactment, and if it operates prospectively, there is no time mentioned in the proviso which can be a limitation on the right of the plaintiff except the period of two years, and the will was probated within that time.

There is no authority in the Court to add the provision to the statute that as against those who had already bought from the heirs more than two years, the will must be probated within a reasonable time, and then fix the time, because the statute is silent on this question, and what is a reasonable time is primarily legislative and not judicial, subject only to the power of the Courts, not to shorten a time limited by the Legislature, but to say whether a particular time is reasonable or unreasonable.

It is essential that statutes barring a right "allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the Legislature, and the Courts will not inquire into the wisdom of the decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." Cooley Const. Lim., 523-4.

"The only restriction upon the Legislature in the enactment of statutes of limitation is that a reasonable time be allowed for suits upon causes of action theretofore existing, . . . the reasonableness naturally and primarily is with the Legislature." *Gilbert v. Ackerman*, 159 N. Y., 118.

"When the Legislature, in fixing such time (to bring suit), makes it so short that the right to sue is practically denied, Courts will declare such time unreasonable, and refuse to enforce the law. But Courts cannot go further and fix a time different from that fixed by the Legislature within which suits may be brought. And if the Legislature has failed to fix any time, the Courts cannot, in a given case, supply this legislative lapse. The fixing of the time within which to bring suit, under such circumstances, is purely a legislative function. It is not within the power of the judiciary." *Adams and Freese Co. v. Kenoyer*, 16 L. R. A. (N. S.), 683.

"It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the Legislature, and the Courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. Cooley, Const. Lim., 451." *Wilson v. Iseminger*, 185 U. S., 55.

"The Legislature is the primary judge as to whether the time allowed by a statute of limitations is reasonable. When the Legislature makes the time so short that the right to sue is practically denied, Courts will declare such time unreasonable, but they cannot go further and fix a different time; neither can they, if the Legislature fails to fix any time, supply this legislative lapse." 17 R. C. L., 677.

We therefore conclude that the proviso is prospective in its operation, and that the plaintiff had two years from its enactment to probate and record his will, and it follows that the judgment must be affirmed.

The distinction between this case and *Matthews v. Peterson,* 150 N. C., 132, which was approved in *Fisher v. Ballard,* 164 N. C., 329, is that in the *Peterson case* five months elapsed between the enactment of the statute and the time it became operative, and it was held this time could be considered, and that it afforded reasonable opportunity for the assertion of the right, which feature is not present in the statute now before us.

No error.

CLARK, C. J., dissenting: Margaret Barnhardt died in 1898, seized of an undivided one-third interest in a tract of land in which her sisters, Minnie Ellis and Loula Gibbs, were the other tenants in common. The land was subject to the life interest of their father, who died 11 April, 1917. This life interest had been bought in by her sisters, Mrs. Gibbs and Minnie Ellis, in 1895. Margaret died in 1898, leaving no children, and having had none. The husband was, therefore, not entitled to tenancy by the curtesy, and there being no notice of a will, the two surviving sisters, who were her heirs at law in 1908, sold the land, including the life estate, to the defendant, an innocent purchaser for value, who has been in possession since that time.

On 9 March, 1915, the General Assembly enacted chapter 219, Laws 1915, which is as follows: *"Provided,* that the probate and registration of any last will and testament shall not affect the rights of innocent purchasers for value from the heirs at law of the testator, when such purchase is made more than two years after death of the testator, unless said last will and testament has been fraudulently withheld from probate." On 12 February, 1917, twenty-three months and three days after the enactment of the statute of 1915 above recited, the plaintiff, the husband of Margaret Barnhardt, probated her will, which purports to devise to him her interest in said land.

It is true that the purchaser is not protected by his adverse possession since 1908, because the statute did not run until the falling in of the life estate, which he had bought as a part of his title. But after the passage of the statute of 1915 it was incumbent upon the plaintiff, claiming under the will of Margaret Barnhardt, to probate the same within a reasonable time, for the two years therein allowed had already elapsed. The Legislature being the judge of what is a reasonable time, a statute of limitation prescribed by it is conclusively a reasonable time, and binding on the Courts. The only exception is that where the statute shortens the time the Courts hold that the party who would be barred is entitled to a reasonable time after the passage of the act in which to bring his action, but it has never been held that he must have the full time allowed by the statute. In this case, there is no exception in the statute, and the plaintiff, under the letter of the act, can assert no title under a will not probated within two years after the death of the testator.

He was fixed by law with notice of the statute, and it was incumbent upon him within a reasonable time to take himself out of the bar put upon his claim, but such reasonable time was not two years. In *Matthews v. Sallie Peterson*, 150 N. C., 132, it was held that the administrator did not move within a reasonable time when he waited for more than a year after the passage of the statute shortening the limitation. In *Matthews v. Hannah Peterson, ib.*, 134, the Court held that in such case, if the action was brought within one year, it would be within a reasonable time.

These two cases hold: "When a limitation of time for bringing an action is shortened by statute, there must be a reasonable time, notwithstanding the statute in which to bring the action, but this by no means requires that the party who would be barred by the statute is entitled to the full time allowed by the statute in which to bring his action."

The defendant bought, in good faith, without notice, and for value, from the heirs at law, who, by this statute, it was intended should be protected by the failure to probate the will within two years after the death of the testator. There being no exception in the statute, to prevent any hardship where the two years has already expired, or less than that time remains, the Courts hold that in such case, notwithstanding the letter of the statute, a devisee shall have a reasonable time. He is not entitled, however, to two years from the passage of the act, but two years from the death of the testator and a reasonable time for him in which to probate this will was less than the twenty-three months and three days after passage of the act, and the defendant ought not to be disturbed in his possession. This action was not brought by the plaintiff till 14 September, 1917, nineteen years after the death of his wife, during all of which time he had withheld the will from probate.

MORGANTON MANUFACTURING AND TRADING COMPANY v. FOY-SEAWELL LUMBER COMPANY.

(Filed 3 December, 1919.)

1. **Appeal and Error—Objections and Exceptions—Findings of Fact—Evidence.**

   Findings of fact by the judge, made with the consent of the parties, have the force and effect of a verdict, and are not reviewable on appeal except for the want of sufficient legal evidence to support them.

2. **Appeal and Error—Signing Judgment—Formal Exceptions.**

   Formal exceptions to the act of the judge in signing the judgment appealed from present no questions of law for review on appeal.

3. **Courts—Orders—Control of Funds—Banks and Banking—Commissions—Adverse Claims.**

   Where the parties to a proceeding in attachment agree that the property be sold, and the proceeds deposited in a certain bank to await the final outcome of the action, and the bank so receives them and sets up an adverse claim, it is sufficient to sustain an order of court on the bank to pay the money to another commissioner appointed by the court.

APPEAL by respondent from *Long, J.*, at the December Term, 1918, of BURKE.

This is an appeal from a judgment rendered in the above entitled action against the respondent, the Battery Park Bank of Asheville, N. C., on the motion of the plaintiff, heard out of the district at Statesville, N. C., by consent, upon a rule to show cause why said respondent should not be required to file statement and pay to the commissioner appointed in this action all such funds as had been deposited with it by the defendant, or come into its hands since 10 May, 1915, from the proceeds of sales of the property attached in this action.

The said judgment was rendered upon a consideration of the proceedings in this action as appears of record, and on file herein, and the affidavits and proofs offered on said hearing before Judge B. F. Long, as follows:

(1) This action was begun in the Superior Court of Burke County on 26 April, 1915, by summons issued out of the Superior Court of Burke County, and an attachment therein levied upon the property of the defendant; that a part of the said property consisted of a carload of lumber, which was levied on under said attachment at Hickory, in Catawba County, while in the act of being shipped out of the State to M. P. Berglass & Company of New York, to whom it had been consigned by the defendant.

(2) That shortly after this action was instituted, to wit, on 10 May, 1915, an agreement was entered into between the plaintiff, Morganton

Manufacturing & Trading Company, and the defendant, Foy-Seawell Lumber Company, and filed and made a part of the record whereby it was stipulated that the defendant might sell and dispose of the Berglass car of lumber and other property attached and deposit the proceeds of such sale or sales with the Battery Park Bank of Asheville, N. C., to be held by said bank pending the outcome of said action; the said agreement reciting, among other things, "that, whereas, a car of lumber has been loaded and billed to M. P. Berglass & Company, of Brooklyn, N. Y., and whereas, the draft covering said shipment has been assigned to the Battery Park Bank of Asheville, N. C., for collection, and whereas, a portion of the balance of said lumber, now at Morganton, N. C., has been sold by the defendant: It is, therefore, agreed that the said car of lumber consigned and billed to the said M. P. Berglass Company, of Brooklyn, N. Y., be released from said attachment, and that the proceeds of the sale of said car of lumber be deposited in and held by the Battery Park Bank of Asheville, N. C., pending the outcome or settlement of said suit, subject to the rights of both plaintiff and defendant, and without prejudice."

(3) That after said agreement had been filed and made a part of the record, as aforesaid, to wit, at the October Term, 1915, of the Superior Court of Burke County, the said Battery Park Bank came into court by and through its attorneys, Lee & Ford, and intervened and made itself a party to this action by filing affidavit in which it set up title under mortgage to a part of the property attached in this action, including a part of that contained in the Berglass car, which was shipped in the name of the defendant to New York and sold under said agreement.

His Honor made the following findings, among others:

"Fourth. I find that after the making of said agreement, to wit, on the hearing before the referee, the said bank set up title under its said mortgage to a part of the lumber contained in the Berglass car, and to certain other portions of the property attached in this action. The records and admissions show that the same attorneys for the defendant company also represented the bank during the litigation, and now A. B. Foy himself admits that under the agreement of plaintiff and defendant, signed by the attorneys on both sides, he deposited the proceeds of the car shipped to the French Broad Lumber Company with the Battery Park Bank.

"Fifth. I find that the value of the property removed and embraced in the agreement is apparently as much as $1,650 in value, and that the defendant, Foy Seawell Lumber Company, was at the time of said agreement insolvent, and this was known by the said bank at the times the defendant made deposits with it after 10 May, 1915.

"Sixth. I find that after the making of said agreement the defendant, Foy-Seawell Lumber Company, from 11 May, 1915, to 27 April, 1917, had on deposit with the said bank the sum of $2,229.91, and that said defendant was allowed to check out all of said deposits in excess of $30.94—but to whom the payments of $2,198.97 were made is not shown in bank's answer. The balance of $30.94 was paid to Commissioner Halliburton."

An order was then made upon the findings directing the bank to pay to the commissioner the money it had received under the agreement, and the bank excepted and appealed, assigning the following errors:

For that the court erred in its finding of facts as set out in respondent's first exception, which is as follows:

"1. His Honor, Judge Long, in his judgment, in the latter part of finding of fact No. 2, finds, among other things, 'the bank holding the bill of lading for said car of lumber' (stenographer's notes, p. 135), to which finding of fact the respondent, Battery Park Bank, in apt time objected and excepted.

"2. I find that after said bank was made a party to this action, to wit, at the August Term, 1916, of Burke Superior Court, an order was made in this action reciting that the car of lumber attached herein and billed to Berglass & Company had been released with the agreement that the proceeds thereof were to be placed in the hands of a trustee to await the determination of this action. The judgment of Judge Webb, December Term, 1918, is made a part of this finding.

"3. I find that the value of the property removed and embraced in the agreement is apparently as much as $1,650 in value, and that the defendant, Foy-Seawell Lumber Company, was at the time of said agreement insolvent, and this was known by the said bank at the times the defendant made deposits with it after 10 May, 1915.

"4. His Honor, Judge Long, signed the judgment appearing in record, to which the Battery Park Bank in apt time objected, and excepted."

Avery & Ervin for plaintiff.
Lee & Ford for defendant.

ALLEN, J. It will be noted that the first, second, and third assignments of error are based on exceptions to findings of fact of his Honor, and not on the ground there is no evidence to support them, and, "A jury trial being waived, the findings of fact by the judge have the force and effect of a verdict, and are conclusive upon us, in the absence of an exception that there is no evidence to support them." *Caldwell County v. George,* 176 N. C., 608.

The fourth assignment, if it is merely to the act of signing the judgment, is formal, and "presents no question of law for review" (*Church v. Dawson,* 157 N. C., 566), and, if treated as an exception to the judgment, it presents the single question whether the facts found or admitted are sufficient to support the judgment (*Ullery v. Guthrie,* 148 N. C., 419), and we are of opinion that the findings that the property attached was sold and the proceeds deposited in bank by agreement of the parties, which was made a part of the record, and that the bank received the money under the agreement, are ample to justify an order requiring the bank, which had undertaken to set up an adverse claim, to pay the money to another commissioner appointed by the court.

"Every court out of which process is issued has general superintending power over moneys collected thereon." 7 R. C. L., 1034.

Affirmed.

IVY C. NANCE, TRADING AS MONTGOMERY HARDWARE COMPANY, v. JOHN KING.

(Filed 3 December, 1919.)

1. Mortgages—Chattels—Sales—Presence of Property—Void Sales—Accounting—Market Value.

The foreclosure of a chattel mortgage under the general power of sale ordinarily appearing in such instruments, requires that the property should be sold "with such reasonable care as would produce the best results," and is likened, in some respects, to sales under execution, wherein the property must be present at the time or place of sale, or so near as to afford the bidders an opportunity to examine it and make some estimate of its worth; and when the sale is not accordingly made, the mortgagor or those claiming under him may by his action have it declared void, and hold the mortgagee to account for its market value, unless the former has expressly assented to such sale or in some way has waived his rights concerning it.

2. Same—Pleadings—Counterclaim.

Where the mortgagee has taken personal property subject to his mortgage in his action of claim and delivery, and has sold the same under the power of sale contained in the mortgage, but contrary to law by not having the property present at the sale, the defendant mortgagor may set up by counterclaim his right to have the sale declared void, and hold the mortgagee responsible for an accounting for the market value of the property so sold.

3. Mortgages—Sales—Void Sales—Evidence—Market Value.

Where a mortgagee is held accountable for the market value of personal property, he sold under a sale void for noncompliance with the law, an answer to a question, "What was the property worth at the time of the seizure—its reasonable market value?" is not objectionable on the ground that it was testimony of the worth of the property, and not its market value, the answer necessarily being the market value of the property.

4. Same—Principal and Agent.

Where a mortgagee is held accountable to the mortgagor of personal property for its market value under a void sale under the power in the instrument, testimony of the bidder for the purchaser at the sale that he had offered to return the property on the payment of the mortgage is incompetent, when it is not shown that the agent for the purchaser had authority to carry the offer into effect, or the condition of the property at the time of the offer, or its deterioration.

5. Appeal and Error—Objections and Exceptions—Unanswered Questions.

An exception to a question asked a witness will not be considered on appeal when the expected answer is not made to appear, or its materiality shown.

6. Mortgages—Sales—Void Sales—Liens—Credits—Judgments.

The plaintiff in the action seizes under claim and delivery personal property subject to his own first mortgage, and to a second mortgage held by another, sold the same under a void sale, satisfied his own lien, and paid the balance of the purchase price on the second mortgage lien. The defendant mortgagor set up and recovered upon a counterclaim that the market value was in excess of the two liens. *Held*, there was nothing to the plaintiff's prejudice in the judgment allowing him a credit for the amount he had paid on both the mortgages.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at April Term, 1919, of MONTGOMERY.

The action is for claim and delivery of a portable sawmill and other personal property. Plaintiff filed a chattel mortgage only, with power of sale on the property to secure $189.29, and defendant was in default in reference thereto. It also appeared that there was a second unsatisfied note on the property in favor of the Troy Milling Company to secure $100. The property having been seized by ancillary process and delivered to plaintiff, he sold the same at public auction under a general power contained in the mortgage, and the same was purchased by one W. I. Myrick, for the Lexington Grocery Company, at $307. That of this sum, after satisfying plaintiff's debt and costs, etc., plaintiff, on demand of J. W. Lemmons, agent of the Troy Milling Company, paid the remainder ($99.50) to said milling company on the second mortgage held by them on a large portion of the same property.

Defendant admitting the existence of both mortgages as alleged, and there were facts in evidence tending to show that plaintiff had not sold the property seized in the cause as required to do by the law and the obligation of the contract, the testimony, among other things, being to the effect that defendant was not present at the sale, and had no representatives there; that the property was not present at the courthouse in

Troy, where the sale was had, but eleven and one-half miles away; that there were few bidders present, and these had no opportunity to view the property before bidding at the time and place of sale; that by reason of such failure, the property was sold at great sacrifice, and defendant thereupon set up a counterclaim for the actual value of the property, over and above the amount required for plaintiff's debt.

On issues submitted, the jury rendered a verdict that there had been no valid foreclosure by reason of the failure of plaintiff to observe the requirements of the law and his contract concerning the sale.

The actual value of the property at time of sale was $700.

On motion, there was judgment for defendant for the difference between the market value of the property as assessed by the jury and the amount of the mortgages set out in the complaint. Plaintiff accepted, and appealed.

W. A. Cochran for plaintiff.
J. A. Spence for defendant.

HOKE, J., after stating the case: It is the accepted law in this jurisdiction that in order to a valid foreclosure of a chattel mortgage under a general power of sale ordinarily appearing in the instruments, the property should be sold "with such reasonable care as to produce the best results." Such cases are likened in some respects to sales under execution, and in both it is required that the property be present at the time and place of sale, or so near as to afford bidders an opportunity to examine it and make some fair estimate of its worth. *Barbee v. Scoggins,* 121 N. C., 135-143; *Alston v. Morphew,* 113 N. C., 460; *McNeeley v. Hart,* 30 N. C., 492; *Wormell v. Nason,* 83 N. C., 33; Freeman on Executions, sec. 290.

In *Barbee's case,* our present *Chief Justice,* speaking to the question, said: "The goods were not in plain view, but were in a store 100 or 150 yards from the place of sale, and, moreover, they were sold in lump, which was calculated to make them bring much less than their value. The mortgagor is in the power of the mortgagee, and the Courts require that these sales be made with such reasonable care as to produce the best results," citing *McNeeley v. Hart,* 30 N. C., 492, and *Ainsworth v. Greenlee,* 7 N. C., 470; and in *Alston v. Morphew, supra,* the prevailing rule, and the reasons for it, are set forth by *Associate Justice McRae* as follows:

"The uniform current of decisions in this State, from *Blount v. Mitchell,* 1 N. C., 86, are to the effect that, upon sales by sheriffs or constables of personal property under execution, the property should be present at the sale, and in the possession of the officer, so that immediate delivery may be made to the purchaser. These requirements are fulfilled, however, if it is in plain view, or so near that it may be personally inspected by all present at the sale who may choose to examine it. The sale 'must be conducted in such a manner that every person who may come up before the articles are knocked down by the auctioneer may see and examine them, so as to enable him to become a bidder if he choose. To hold otherwise would be to give some of the persons present an advantage over others, and thus prevent that fair and open competition which the law so much desires in sales of this kind.' *McNeely v. Hart,* 30 N. C., 492. The reason of the rule is clearly stated in *Ainsworth v. Greenlee,* 7 N. C., 470: 'The constable's authority to sell these goods was derived under a *fieri facias,* the execution of which the law requires to be done in such a manner as that by the sale the property is most likely to command the highest price in ready money. It is evident that for this purpose the bidder ought to have an opportunity of inspecting the goods and forming an estimate of their value, without which it is not to be expected that a fair equivalent will be bid. The presence of the goods, too, in the possession of the officer, to which possession the levy gives him a right, assures the bidders that a delivery will be made to the highest bidder forthwith, and that so far the object of the purchase will be attained without litigation.' "

This being the recognized position, it follows that a sale under the power as ordinarily contained in a chattel mortgage in disregard of this requirement is ineffective as a foreclosure, and the mortgagee who has so disposed of his property may be properly held to account for its market value at the instance and election of the mortgagor, or those claiming under him, unless the latter has expressly assented to such a sale, or in some way waived his rights concerning it.

And there is express decision with us to this effect, that this right of the mortgagor may be made available as a counterclaim in an action instituted by the mortgagee for claim and delivery of the property. *Smith v. French,* 141 N. C., pp. 1-5, defendant's appeal.

The rights of the parties have been determined in accord with these principles, and on careful consideration of the record we find nothing that will justify us in disturbing the results of the trial.

It was objected for error on the issue as to damages that a witness was allowed to state that in his opinion the property was worth $800 at the time of seizure, when he should have given its market value. The question to which the witness answered was, "What was the property worth at the time of seizure—its reasonable market value?" And the answer to the question so framed could only have signified that $800 was its market value. Again, it was objected that in the examination of the witness Myrick, who purchased the property at the sale for his employers, the Lexington Grocery Company, the court excluded a question whether the witness had not offered to return the property on payment of the two mortgages. It was not shown that Myrick had any authority to carry out that offer, either from plaintiff or his own company. Nor did it appear what was the condition of the property at the time, nor how much it may have deteriorated since the seizure. Indeed, we do not discover, by suggestion or otherwise, what the answer of the witness would have been, and the objection must be overruled.

In the judgment plaintiff has been allowed credit, both for the amount of his own mortgages and that of the Troy Milling Company, and there is nothing to plaintiff's prejudice in this disposition of the matter.

There is no error, and the judgment must be affirmed.

No error.

R. T. LEWIS v. L. A. CARR, E. C. GUY, AND C. B. BAIRD.

(Filed 3 December, 1919.)

1. Libel and Slander—Slander—Publication—Evidence—Education—Conversion—Actions.

The defendant, owner and publisher of a newspaper, published an article charging therein that the plaintiff, county chairman of the board of education, had no right to pay out of the county school fund his expenses to the State Teachers' Assembly, and, upon plaintiff's request to publish his proofs, he printed affidavits of his codefendants, officers of the bank, of deposit of such funds, that the bank had paid vouchers to the plaintiff stating on their face they were for the said purpose. Upon the trial for slander it was shown that no such vouchers had ever been issued. *Held*, the exhibition of the affidavit to the notary before whom it was sworn, and to the owner of the newspaper that published it, was a publication by the defendants, officers of the bank, and giving it to the publishers was evidence of the purpose and intent to circulate it, which, in effect, charged the conversion of the county's funds to the plaintiff's own use in violation of law, and thereupon an action for slander against them will lie.

2. Libel and Slander—Slander—Qualified Privilege—Malice—Presumptions—Evidence.

Publishing, or causing to be published, affidavits which in effect charges a public officer with appropriating public funds for his own expenses contrary to law, is qualifiedly privileged, and raises the presumption that the publication was *bona fide;* and though the falsity of the charge would not of itself prove malice, there is evidence thereof sufficient to go to the jury where the defendants were in a position to know at the time that the charge was false, by their connection or presumed knowledge, or where such knowledge was readily accessible to them.

3. **Libel and Slander—Slander—Education—Misappropriation of Funds—Embezzlement—Statutes.**

Under the provisions of Rev., 4141, the chairman of the county board of education is not required to attend the State association of county superintendents, their only allowance being two dollars per day and mileage, Rev., 2786, and a published charge that he had attended the State association and had taken his expenses thereof from the county funds is a charge of a breach of official duty, misconduct, and conversion of the public funds, and, semble, of embezzlement.

4. **Libel and Slander—Slander—Publication—Common Purpose—Parties—Misjoinder—Statutes.**

Where two persons make an affidavit of a libelous character which is published according to their common purpose, in a newspaper, by a third, all three unite in the libelous words, and may be sued in the same action for the libel, and it may not be dismissed for misjoinder. In this case no objection for misjoinder was taken either by answer or demurrer, and under Rev., 474 (5), 476, 478, a motion to separate, and not to dismiss, is required.

APPEAL by plaintiff from a judgment of nonsuit by *Webb, J.*, at April Term, 1919, of AVERY.

This was an action for libel, brought by the plaintiff, chairman of the board of education of Avery County, against the defendant Carr, owner and publisher of the "Mountaineer and Avery Herald," a newspaper published in Avery County, and the defendants, Guy and Baird, who were the cashier and assistant cashier of the Avery County Bank. At the conclusion of the plaintiff's evidence the court granted a motion for nonsuit, from which the plaintiff appealed.

F. A. Linney, W. C. Newland, R. W. Wall, and S. J. Ervin for plaintiff.

L. D. Lowe for defendant Carr.

Councill & Yount and Harrison Baird for defendant Baird.

CLARK, C. J. The defendant Carr, owner and publisher of "The Mountaineer and Avery Herald," at Newland, N. C., published an article therein which charged that the county superintendent of education had no right to pay out of the county school funds the expenses of the chairman of the county board of education to the teachers' assembly at Charlotte. The plaintiff, who was chairman of the county board of education, called upon the defendant Carr to publish his proofs, and he thereupon printed an affidavit by the defendants Guy and Baird, cashier and assistant cashier of the Avery County Bank, sworn to before a notary public, that the bank had paid a voucher to the plaintiff signed by him as chairman of the board of education and by the superintendent of public instruction of the county, which voucher stated on its face that it was to pay the expenses of the plaintiff for the trip to the educational meeting at Charlotte in November, 1917.

At the trial the plaintiff offered evidence of the publication of the affidavit in the paper; that no such voucher had ever been issued or authorized to be issued, or had been paid by the bank, and also put in evidence the monthly statements of the bank, with the accompanying vouchers issued by the county board of education, and paid by the bank, and stubs of all vouchers issued by the board, which showed no such voucher.

The exhibition of the affidavit to the notary public and to Carr was a publication by the defendants Guy and Baird, *Logan v. Hodges,* 146 N. C., 38; *Brown v. Lumber Co.,* 167 N. C., 13, and the preparation and handing the article to Carr to be printed in the paper was evidence of the purpose and intent that it should be circulated. The article and affidavit in effect charged the defendant with the conversion to his own use of the funds of the county without authority of law. If this was not a direct charge of embezzlement it was at least an allegation of a gross breach of official duty, misconduct, ignorance and incompetence of the plaintiff as chairman of the board of education of Avery, in issuing and signing a voucher payable to his own order out of the public school funds of the county, collecting the voucher and converting the funds to his own use in violation of law. *Osborne v. Leach,* 135 N. C., 630.

The publication was not absolutely privileged, for it was not in the performance of public service, in which case, notwithstanding proof of the falsity of the charge, and actual malice, an action cannot be maintained thereon. It was qualifiedly privileged, because, though the defendant was under no legal obligation to act, it was a publication required by the public good if the charge were true. In cases of qualified privilege the falsehood of the charge will not of itself be sufficient to establish malice, for there is a presumption that the publication was made *bona fide.* *Fields v. Bynum,* 156 N. C., 416; *Gattis v. Kilgo,* 140 N. C., 106; *Ramsey v. Cheek,* 109 N. C., 270.

But in cases of qualified privilege, though the falsity of the charge (taking the evidence for the plaintiff to be true, as we must on a nonsuit) would not of itself prove malice, there was evidence sufficient to go to the jury of malice from the fact that the defendants Guy and Baird had paid these vouchers, and they knew, or should have known, that the charge was false. The school vouchers were public records, and all three defendants could have ascertained the falsity of the charge by the means of information in their power. They published an affidavit in regard to the discharge of his duty by a public officer, which was tantamount to the charge of embezzlement. *Osborne v. Leach,* 135 N. C., 630. Rev., 4141, provides that the county superintendent shall attend the annual meetings of the State association of county superintendents, and that the county board of education of his county shall pay out of the county school funds his traveling expenses and board. As to the county board of education, they are not required to attend, and their only allowance is $2 per day and mileage. Rev., 2786. If the charge was not one of embezzlement, it was a charge of a breach of official duty, misconduct, and conversion of public funds. *Osborne v. Leach, supra; Ivie v. King,* 167 N. C., 177. Whether embezzlement was intended to be charged was a question for the jury. *Beck v. Bank,* 161 N. C., 203.

The defendants rely upon *Rice v. McAdams,* 149 N. C., 29, where two parties were charged jointly with uttering different slanderous words. Here all three united in the same libelous words, two preparing the affidavit and handing it to the third for publication. There was no objection for misjoinder taken either by answer or demurrer. Rev., 474 (5); Rev., 476, 478. In that case there was no common purpose or design shown, and the Court said the action should have been divided, but that it would be error to dismiss it. In this case there was common purpose and action, and no ground to divide the action or dismiss it.

The judgment of nonsuit must be

Reversed.

ED. S. LOVEN AND ROBERT LOVEN v. R. E. ROPER, JEFF FRANKLIN, AND WILLIAM AUSTIN.

(Filed 3 December, 1919.)

1. **Actions—Estates—Reversion—Possession—Tenant by the Courtesy—Life Tenant.**

   After the death, intestate, of the mother, the owner of lands, her children hold a reversionary interest therein during the life of their father, and the father, being the tenant by the courtesy, and entitled to the possession, they may not presently maintain an action asserting their ownership and right to possession before his death.

2. **Actions—Estates—Reversion—Possession—Cloud on Title—Parties—Life Tenant.**

   The holders of a reversionary interest in lands may presently maintain their action against one unlawfully in possession, claiming the title, to remove such adverse claim as a cloud upon their title, under our statute, Pell's Revisal, sec. 1585; and the life tenant is not a necessary party to the action, but the trial judge, in his discretion, may order him to be joined therein as a party plaintiff or defendant.

3. **Pleadings—Title—Reversion—Estates.**

   The plaintiff, the owner of a reversionary interest in lands, may maintain, under general allegation of his ownership of the fee, his action to remove, as a cloud upon his title, the wrongful claim of title by one in possession, without specific allegation as to his ownership in reversion, the general allegation of title being sufficiently broad to include his ownership in remainder, there being nothing in the form of the averment calculated to mislead the defendant, or take him by surprise.

CIVIL ACTION to recover land, tried before *Webb, J.,* and a jury, at April Term, 1919, of AVERY.

The complaint of plaintiffs sets forth two causes of action:

First. One asserting ownership and the right to possession, which was wrongfully withheld by defendant.

Second. That they were the owners in fee of the land, and defendants were in possession wrongfully, claiming title, and asking that the said false claim be removed as a cloud upon the true title held by them. At the close of the testimony on adverse intimation from the court as to plaintiff's right to recover on either cause of action, plaintiffs suffered a nonsuit and appealed.

R. W. Wall, T. A. Love, and F. A. Linney for plaintiffs.
Spainhour & Mull, W. C. Newland, and S. J. Ervin for defendants.

HOKE, J. There was evidence on the part of plaintiff tending to show that plaintiffs are the children and heirs at law of Mary Jane Loven, deceased, and that the father of plaintiffs, G. A. Loven, was alive at the institution of the suit, and was not a party thereto, neither as plaintiff nor defendant. That Mary Jane Loven was the only child and heir at law of John Webb, deceased, who had a grant from the State covering the land in controversy, thus showing the title in reversion to the land in plaintiffs. That defendants were in possession of the land, wrongfully asserting title to the same in themselves and adverse to that of plaintiffs. From these facts, making in favor of plaintiff's claim, and which must be taken as true on a judgment of nonsuit, it appears that at the time of action instituted G. A. Loven, father of plaintiffs, and not a party, was entitled as tenant by the curtesy to a life estate, and the right of present possession of the land, and as to this first cause of action plaintiffs have been properly nonsuited. *Blount v. Johnson,* 165 N. C., 25.

We see no reason, however, why, on the facts presented, the plaintiffs as owners of the inheritance cannot maintain the second cause of action, that to remove a cloud upon their title.

Our statute controlling in actions of this character (Pell's Revisal, sec. 1589) is very comprehensive in its terms and purport, and clearly applies to the facts presented in the present instance. Speaking to the question, in *Satterthwaite v. Gallagher,* 173 N. C., 528, approved in the more recent case of *Nobles v. Nobles,* 177 N. C., 243, the Court said:

"Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner, or which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value."

It is fully understood that the owners of an estate in remainder or reversion may resort to appropriate actions to protect their interests. Even in cases of trespass such actions may be maintained when the injury has caused permanent damage affecting the value of the inheritance, and with or without the presence of the life tenant. Such a suit was upheld in a decision at the last term, of *Balsom v. Johnston,* 177 N. C., 213-217, which was to recover for damages done to the inheritance by fire attributed to the negligence of defendant. In actions of this character it may be at times desirable that the life tenant should be joined in order that the entire damages may be fixed and apportioned in one and the same suit, and doubtless the judge, in his discretion, might order the life tenant to be joined as party plaintiff or defendant. But the decisions referred to, and others of like kind, are to the effect that even in actions involving an award of pecuniary damages the life tenant is not a necessary party, and if this be true, the principle should assuredly apply to actions of the present kind, where the presence of the life tenant is in no way required either for the convenience of the parties or the protection of interests involved in the suit. There is no merit in the position insisted on that the nonsuit should be sustained because the complaint does not allege that plaintiffs are owners in reversion, but alleges generally ownership in fee. There is nothing in this form of averment that is calculated to mislead the defendants, or take them by surprise; it is broad enough to include the plaintiffs' interest in remainder, and under it he may show any estate or interest in the property that is entitled to protection under the statute against a wrongful claim of title on the part of defendants.

We are of opinion, therefore, that as to the second cause of action there is error, and this will be certified that the order of nonsuit be set aside, and the action proceeded with in accordance with law.

Error.

E. M. HENOFER v. REALTY LOAN & GUARANTY COMPANY.

(Filed 3 December, 1919.)

1. **Deeds and Conveyances—Purchaser by Acre—Shortage of Acreage—Actions—Warranty of Title—Warranty of Acreage.**

   Where a conveyance is made of a certain number of acres of land at a specified price per acre, based upon an honest miscalculation of the parties from a map, and it is ascertained after the conveyance had been made that the purchaser obtained a much less number of acres than he had paid for, he may maintain his action to recover against his grantor the difference in the number of acres between that paid for and received, as on a breach of contract; and, also, under a breach of warranty of title, the price of the acreage he had paid for and to which his grantor had no title. The principle upon which the grantee may not recover for a deficiency in acreage recited in a deed conveying a definite or described tract of land, without warranty as to the acreage, is distinguished.

2. **Pleadings—Allegations—Proof—Prayers for Relief.**

   The plaintiff is entitled to recover upon the cause alleged and proved, and is not confined to the relief prayed for in his complaint.

3. **Pleadings—Amendments—Amplification—New Cause of Action—Limitation of Actions—Deeds and Conveyances—Shortage of Acres.**

   Where the action is neither to correct a mutual mistake in a deed nor for decree for specific performance to convey land omitted therefrom, but to recover on a breach of the contract and bond for title the amount paid under mutual mistake for the shortage in acres sold by the acre, leave given the plaintiff to amend his complaint by alleging he was a nonresident and was unacquainted with the lands he was buying, and was without knowledge or opportunity to know of the deficiency, does not introduce a new cause of action, barred by the statute of limitations, but is only an amplification of the complaint to specify more particularly the cause of action.

APPEAL by defendant from *Finley, J.*, at February Term, 1919, of McDOWELL.

This is an action to recover damages for a deficiency in the acreage of a tract of land purchased and paid for by the acre. The acreage was calculated from a map used by the defendant. The plaintiff contracted to buy, and the defendant to sell, at a certain price per acre, and the calculation of acreage, based on the map, showed 2,611 acres in all, and the plaintiff paid for that number of acres at the contract price. Both parties were under the honest but erroneous belief that the land covered by the boundaries in the map would come to 2,611 acres, when in fact the tract, as conveyed, contained but 1,896 3-16 acres, a deficiency of 714 13-16 acres. Of this deficiency 522 3-8 acres was the difference between the acreage included in the boundaries set out in the deed executed by the defendant to the plaintiff, and the acreage within the boundaries laid down on the map, and the other 192 7-16 acres of shortage was caused by a failure of title to that extent in the acreage within the boundaries as set out on the deed.

The above facts were found by the referee and approved by the judge. The referee rendered judgment for the shortage of 192 7-16 acres within the boundaries of the deed as a breach of warranty, and judgment against the plaintiffs on the claim for shortage as to the 522 3-8 acres.

The judgment, as entered by the judge, was simply for the entire shortage of 714 13-16 acres at the contract price of $2.50 per acre, with interest. Appeal by defendant.

Pless & Winborne and S. J. Ervin for plaintiff.

Avery & Erwin, Hudgins & Watson, and Murray Allen for defendant.

CLARK, C. J. The judgment of the court that the plaintiff recover for the entire shortage of 714 13-16 acres at the purchase price of $2.50 per acre with interest is affirmed. The defendant does not contest judgment for the 192 7-16 acres conveyed by the deed, as to which there was a breach of warranty of title in the deed.

Where land is bought by the acre, or there is a collateral agreement (which may be verbal) that the deficiency, if any, shall be made good, the Court will uphold the demand for a rebate, or for a return of the amount overpaid. *McGee v. Craven,* 106 N. C., 355; *Sherrill v. Hagan,* 92 N. C., 345; *Currie v. Hawkins,* 118 N. C., 593, cited and approved; *Brown v. Hobbs,* 147 N. C., at p. 77.

It is true that where the contract, or the deed, is for a specified tract of land, on the mere recital of the number of acres where there is no warranty in the deed as to the acreage, the vendor cannot recover for any shortage in the acreage, in the absence of allegation and proof of fraud and misrepresentation in the acreage, unless there is a failure of title for part of the land conveyed, in which case he recovers damages upon the warranty of title.

In *Galloway v. Goolsby,* 176 N. C., 638, it is said to be settled in this State that "where a definite tract of land is sold, or contracted to be sold, in the absence of fraud and false representation, a party purchases the tract agreed upon, and in the absence of guarantee as to quantity, is entitled to no abatement if there is a shortage, nor is the vendor entitled to an addition to the price if there is an excess." That case cites to the same effect *Turner v. Vann* (*Allen, J.*), 171 N. C., 129; *Bethell v. McKinney,* 164 N. C., 78; *Stern v. Benbow,* 151 N. C., 462, and *Smathers v. Gilmer,* 126 N. C., 757.

It is immaterial how much of the shortage was caused by the contraction or alteration of the boundaries in the deed from those on the map, or how far it was caused by a failure of title to part of the acreage within the boundaries laid down in the deed. This case rests upon the breach of contract, and bond for title in the failure to convey by a good title the number of acres that the defendant sold, and the plaintiff paid for, at $2.50 per acre. It turned out that the land conveyed by a good title lacks 714 13-16 acres of being 2,611. It is exactly the case as if the defendant had sold the plaintiff 2,611 bushels of wheat, describing it as being contained in a certain barn, at the price named. If, on delivery of the wheat, it proved to be 522 3-8 bushels short, and of that actually delivered the vendor's title proved defective as to 192 7-16 bushels, the plaintiff would be entitled to recover for the whole deficiency—714 13-16 bushels—at the price paid, as for money had and received. This is not solely on the ground of warranty of title, but because the plaintiff paid for a greater number of bushels than he actually received.

It is true the prayer for relief in the original complaint is for breach of warranty of title and seizin, and for failure of title and deficiency in the acreage of land purporting to be conveyed by said deed. But the plaintiff is entitled to recover any relief to which the facts alleged in the complaint and the proof entitle him to receive. The facts alleged and proven, and not the prayer for relief, controls the judgment. Rev., 467 (3); *Reade v. Street,* 122 N. C., 302, and cases cited thereto in the Anno Ed.; *Johnson v. Loftin,* 111 N. C., 323, and cases there cited.

In the course of the trial the plaintiff obtained leave to amend his complaint by averring that he was a nonresident and not acquainted with the lines and boundaries of the land described in the map, which he understood he was buying, and that he bought and paid for 2,611 acres, because he had no knowledge, or opportunity to know, of the deficiency. The defendant contends that this amendment constituted a new cause of action, and was barred by the statute of limitations, because it was made more than three years after the alleged discovery of the mistake.

This is a misconception of the cause of action, which is not an action to correct a mutual mistake in the deed, nor for a decree of specific performance to convey land omitted therefrom; but it is an action to recover for breach of the contract and bond for title the amount paid for the shortage in acres. The amendment is simply an amplification of the complaint to specify more particularly the cause of action, which was to recover the price paid for the number of acres short of 2,611, the land having been bought by the acre.

The mistake as to the acreage was discovered in 1908, and this action to recover the price paid for said shortage was brought in 1910, and is therefore not barred by the statute of limitations. Rev., 395 (6).

No error.

ANNIE McMAHAN AND HUSBAND, WILLIAM McMAHAN, v. RACHEL PENLAND HENSLEY.

(Filed 3 December, 1919.)

Deeds and Conveyances— Delivery— Intent— Registration— Evidence— Instructions—Verdict Directing.

The registration of a deed to land is only presumptive evidence of delivery, and where the evidence tends only to show that the intent of the grantor was not to have it delivered until after her death, but had sent it to be registered and received it again, and had kept it continuously in her possession without delivering it, actually or constructively, a charge to the jury is correct, that if the jury found the facts according to the evidence, there was not a legal delivery of the deed and no title passed thereunder.

Civil action, tried before *Webb, J.*, at August Special Term, 1919, of Yancey, upon these issues:

"1. Were the deeds for the lands described in the complaint delivered? Answer: 'No.'"

"2. Are the plaintiffs the owners in fee and entitled to the possession of the lands described in the complaint? Answer: 'No.'"

From the judgment rendered the plaintiffs appealed.

Hudgins, Watson & Watson for plaintiffs.
Charles Hutchins and A. Hall Johnston for defendant.

Brown, J. As stated by Mr. Watson, the learned counsel for plaintiff, there is but one question presented by the record, and that is, Were the deeds from the defendant to her daughter, Annie McMahan, and her son, S. S. Hensley, delivered?

The plaintiffs claim under the deed from the defendant, Rachel Penland Hensley, the mother of the *feme* plaintiff. The uncontradicted evidence tends to prove that the defendant procured Squire Hutchins to draw the deeds; one to her daughter, the plaintiff, and the other to her son, S. S. Hensley.

The defendant testified that she did not intend to deliver the deeds to the grantees; that she sent them to Burnsville by her youngest son, Andrew, to be probated and recorded; but that the deeds are now locked up in her trunk in her home, and that they have not been out of her possession since they were made, except when Andrew had them recorded.

The plaintiff offered no evidence except the official record of the deeds.

The court charged the jury: "If the plaintiff has shown that the old lady made the deed under the circumstances that she says she did, that the magistrate came to her home and she was there very sick, and it was her purpose and desire to make the deeds, and she wanted to reserve her life estate, and it was suggested to her by the magistrate that she could do that by making the deed on its face without reservation, and then holding the deeds or put them in the hands of some good man to be delivered to the grantees after her death; if you find she accepted that mode or method, and the deeds were drawn without reservation, being set forth in the deed, and that after being drawn they were delivered to her by the drawer of the deeds, Squire Hutchins; if you find she put these deeds away and the next day she heard one of her sons was going to try to interfere with this arrangement, with what she had done with her property, and try to get hold of the deeds, and if you find that for that reason she told her son to carry them to the clerk's office at Burnsville and have them probated, and then have them recorded, and to bring the deeds back to her, and that pursuant to those instructions her son brought the deeds, and had them recorded, and took them immediately back to his mother, and that she has had them ever since, and that her purpose and intent was not to deliver them until after her death; if you believe that and find those to be the facts by the greater weight of the evidence, then the court charges you there was no delivery of the deeds, and the plaintiffs are not the owners of the land in controversy.

"So taking it that you will find these to be the facts, I instruct you that if you believe all of this evidence that you answer the first issue 'No,' and the second issue 'No.'"

The plaintiff bases her right to recover upon the theory that the probate and registration of a deed is a delivery in law and cannot be rebutted by parole evidence. We think this is going too far. In *Love v. Harbin*, 87 N. C., 252, *Ruffin, J.*, says: "It is not intended to say that the fact of registration is conclusive as to either the execution or probate of the deed, but only *prima facie* evidence." As delivery is a necessary part of the execution of a deed, it follows that registration is only *prima facie* evidence of delivery. *Bryan v. Eason*, 147 N. C., 284, and cases cited in the note to *Love v. Harbin.*

The question of delivery is one of intent, and it was open to the defendant to show that the deed had never been in the possession of the grantee, but had remained in her possession, and was brought back to her as soon as it was recorded. *Helms v. Austin*, 116 N. C., 755.

This Court said, in the case of *Gaylord v. Gaylord*, 150 N. C., 233: "It is a familiar principle that the question of the delivery of a deed or other written instrument is very largely dependent upon the intent of the parties at the time, and is not at all conclusively established by the manual or physical passing of the deed from the grantor to the grantee."

And again the Court said, in the same case: "And the authorities are uniformly to the effect that in order to be a valid delivery the deed must pass from the possession and control of the grantor to that of the grantee, or to some one for the grantee's use and benefit, with the intent at the time that the title should pass or the instrument become effective as a conveyance."

We concede that when the maker of a deed delivers it to a third party for the grantee, parting with the possession of it without any condition or direction to hold it for him, and without in some way reserving the right to repossess it, the delivery is complete, and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor can defeat the effect of such delivery. *Fortune v. Hunt,* 149 N. C., 359. But all the evidence in this case shows that the defendant did not intend to part with the custody of or control over the deeds. The evidence shows that she had them registered on account of the fear that her son, Columbus Hensley, would destroy them. The defendant sent them by her son, Andrew, for registration, with instructions to bring them back to her. The entire evidence is inconsistent with the idea of an actual delivery of the deeds, and if believed by the jury to be true, it is sufficient to rebutt the presumption of delivery arising out of the registration of the deed.

Affirmed.

M. E. THORNBURG v. H. F. LONG.

(Filed 3 December, 1919.)

1. **Physicians and Surgeons—Diagnosis—Treatment—Negligence—Liability —Damages—Error of Judgment—Reasonable Doubt.**

A physician or surgeon only impliedly contracts to have the reasonable knowledge and capability and to use the known and reasonable means in the diagnosis and treatment of his patient, but does not guarantee a cure, and when so qualified, he is not liable in damages for an honest error in judgment in his diagnosis and treatment, committed within the stated rule.

2. **Same—Diagnosis.**

In an action against a consulting physician to recover damages for pain and suffering of his client, evidence that a diagnosis and treatment for a different cause gave the relief sought, is sufficient upon which the jury could find that the defendant's diagnosis was the wrong one, but the evidence in this case is held insufficient for a recovery of damages on that ground, his diagnosis and treatment being according to a recognized and established practice.

3. **Physicians and Surgeons—Diagnosis—Privilege—Communications.**

The communication of a wrong diagnosis of a patient's disease to his regular attending physician, by a consulting physician at whose instance he had acted, is wholly privileged, and not actionable in itself.

CIVIL ACTION, tried before *Long, J.*, at July Term, 1919, of CATAWBA. From a judgment of nonsuit plaintiff appeals.

Council & Yount and W. A. Self for plaintiff.
E. B. Cline, Z. V. Long, and W. D. Turner for defendant.

BROWN, J. The testimony of plaintiff tends to prove that in January, 1918, the plaintiff began suffering from a swollen arm, and, after being treated for about a week by his local physician and receiving no relief, he was sent by his family physician to the hospital of the defendant at Statesville for treatment. Plaintiff told defendant the purpose of his visit, and of his great suffering, and asked defendant to operate on him or give him some relief from his pain.

The defendant examined plaintiff at once, removed his shirt to the waist, found his arm swollen from elbow to neck, examined his back, looked over him, asked him as to his habits, private history relating to women, took blood from him for analysis, put him to bed, called on him next morning to make further examination, gave him some medicine, and told him he could not do anything until he had a report from the analysis of his blood—would not say it was tuberculosis. The plaintiff said the defendant did not know what was the matter with him. The defendant took some blood from plaintiff's arm and sent it to Charlotte to be tested, and the next day the plaintiff returned to his home to await the further orders of the defendant. In a few days the defendant wrote to Dr. Shipp, plaintiff's local physician, that the blood of plaintiff had been subjected to the strongest positive Wassermann test, and that he had a bad case of syphilis, and nothing but heroic treatment would save his life.

The plaintiff testified that he was a virtuous man, and has never had sexual intercourse with any woman other than his wife, who was a woman above reproach.

After plaintiff returned from defendant's hospital, his local physician lanced his arm, and a few days thereafter it was again lanced by Dr. Crowell, of Lincolnton, and the plaintiff has entirely recovered.

The plaintiff alleged that the defendant was negligent in that he failed to properly diagnose and treat his case, and that in consequence thereof he suffered great physical and mental pain for a considerable longer time than he would otherwise have suffered but for the failure of the defendant to properly diagnose his case and to administer the proper remedies.

The law governing the liability of a physician to his patient is well settled. While there is an implied contract that the physician or surgeon who undertakes to treat a patient will use all known and reasonable means to accomplish the object for which he is called to treat the patient; and that he will attend to the patient carefully and diligently; there is no guaranty that he will cure him or that he will not commit an error of judgment. The law implies only that he not only possesses, but that he will employ in the treatment of the case, such reasonable skill, care, and diligence as are ordinarily exercised in this profession. But a physician or surgeon possessing the requisite qualifications, and applying his skill and judgment with ordinary care and diligence to the diagnosis and treatment of a patient, is not liable for an honest mistake or error of judgment in making a diagnosis or prescribing the mode of treatment, where there is ground for reasonable doubt as to the practice to be pursued. Am. and Eng. Ency. of Law, vol. 22, p. 804 "K"; *Long v. Austin,* 153 N. C., 508, also p. 513; *Mullinax v. Hord,* 174 N. C., 607; *McCracken v. Smathers,* 122 N. C., 800.

The question then is, Did the defendant, under the facts as testified to by plaintiff, use that skill and diligence which he was required to use, and is there evidence tending to prove plaintiff's contention sufficient to be submitted to the jury?

There is evidence sufficient to go to the jury that the defendant made an erroneous diagnosis when he concluded that plaintiff suffered from the effects of syphilis, but there is not a scintilla of evidence that he is incompetent or was negligent. On the contrary, evidence offered on behalf of defendant indicates that he stands very high in his profession, and that in diagnosing plaintiff's case he followed recognized and established practice. The fact that defendant wrote to Dr. Shipp that the examination showed evidence of syphilitic poison is no basis for an action. Dr. Shipp was plaintiff's local physician, and the defendant's duty was to communicate to him the conclusion he had reached. The communication was wholly privileged. *Briggs v. Boyd,* 34 N. C., 377; *Nissen v. Cramer,* 104 N. C., 574.

We think the motion to nonsuit was properly allowed.

Affirmed.

G. B. WOODY v. CAROLINA SPRUCE COMPANY.

(Filed 3 December, 1919.)

1. Instructions—Employer and Employee—Master and Servant—Negligence—Physicians—Malpractice.

Where a corporation is liable for damages caused by the malpractice of a physician while attending, professionally, one of its employees, and an issue has been submitted in his action as to whether the corporation had continued to employ the physician after notice of his incompetency, a charge of the court to find the issue in the affirmative, if the defendant had ascertained from all sources the physician's incompetency, should be read in connection with another portion of the charge, that the jury should find this to be a fact by the greater weight of the evidence, and when so read, the instruction is not erroneous.

2. Same—Assumption of Risks.

Where there is an issue as to whether the plaintiff, an employee of the defendant corporation, assumed the risk of being professionally treated by a physician the defendant had selected, and for whose lack of skill the defendant was liable, an instruction upon the evidence is not erroneous that the jury find the issue "No" if plaintiff asked the defendant's president and general manager if he had not better send for another physician, and was advised by him to the contrary, that he, the president, and the physician could perform the services as good as any one, and that the plaintiff had the right to rely upon such assurance.

WALKER and ALLEN, JJ., dissenting.

APPEAL by defendant from *Finley, J.*, at March Term, 1919, of YANCEY.

The plaintiff was injured in the service of the defendant company, and alleges that the physician employed by the defendant, and who was compensated by monthly payments collected by the company from the employees, was guilty of negligence and malpractice.

Verdict and judgment for the plaintiff. Appeal by defendant.

G. E. Gardner and Hudgins, Watson & Watson for plaintiff.
Johnston & Hutchins and Pless & Winborne for defendant.

CLARK, C. J. This case has been already twice before this Court. In *Woody v. Spruce Co.*, 175 N. C., 545, the defendant appealed, the verdict being $3,500, and this Court, in an opinion by *Walker, J.*, granted a new trial for the erroneous admission of a letter claimed, but not duly proven, to have been written by the president of the defendant company. On the second appeal in this case, 176 N. C., 643, this Court, by *Brown, J.*, set aside the judgment of nonsuit, holding that "An employer who furnishes medical treatment to his employees, upon an assessment plan to meet the expenses thereof, is required to exercise due care in the selection of the physician, and in continuing him in its employ, and upon failure to do so is responsible in damages to an employee, caused by the incompetency of the physician." On that appeal the evidence was substantially as in this, and the Court held: "There is abundant evidence, and we do not understand it to be denied, that Dr. Smith was employed by defendant to treat its employees, and that they were assessed to pay the expenses. The defendant was under no legal obligation to employ a physician to treat its employees, but when it assumed to do so, and to deduct a monthly sum from their wages for medical attention, it was under obligations to exercise due care in selecting the physician and in continuing him in its service. *Guy v. Fuel Co.,* 48 L. R. A., 536, cited and approved in the former opinion in this case."

The first assignment of error in this appeal by the defendant is to an instruction to the jury: "If after the defendant ascertained from any and all sources that the physician was incompetent, if it did ascertain such fact, it kept him in its employment, then you will answer 'Yes' to the second issue," which was, Did the defendant engage and employ Dr. D. J. Smith as its physician to treat the plaintiff, and his family, and if so, was the defendant negligent in so engaging or in continuing him in its employment. This instruction must be read in connection with the other part of that instruction, which was that if the jury found by the greater weight of the evidence that the defendant engaged Dr. Smith to treat the plaintiff and other employees, and that after it had notice of his incompetency and unskillfulness, it continued him in its employment, and that he was in fact incompetent and unskillful, they should answer this second issue "Yes."

The defendant owed the duty to the plaintiff, after it had undertaken to secure a doctor for him, to secure one of reasonable skill and ability. *Woody v. Spruce Co.,* 176 N. C., 644; *Guy v. Fuel Co.,* 48 L. R. A., 536.

The second assignment of error is because the court instructed the jury: "If you shall find from the greater weight of the evidence that after the plaintiff was injured he asked Dr. Aldrich, the president and general manager of defendant, if he had not better send for another physician, and if you find that Dr. Aldrich then advised the plaintiff that it was unnecessary, that he and Dr. Smith could set the arm as good as any one, that it was only a simple fracture, then the court charges you the plaintiff had a right to rely upon such assurance, and you will answer the fourth issue 'No.'" This issue was, "Did the plaintiff assume the risk of the treatment by Dr. Smith for the injury complained of in this action?" This point was ruled upon in the former appeal, 176 N. C., 645, where *Brown, J.,* said: "There is evidence that plaintiff, some time before he was injured, complained to the president of the company of Dr. Smith's incompetence, and when he was injured the president assured him that he and Smith were fully competent to perform the operation, and that defendant, in submitting to the operation, relied upon such assurance, as he had a right to do."

There was no other physician, so far as it appears, immediately at hand, and the plaintiff had paid his assessments for the employment of the company's physician, and though he may have had doubts as to his competency, when the president of the company assured him that the fracture was simple, and that he and Dr. Smith could set the fracture as good as any one, the plaintiff was not guilty of contributory negligence, nor did he assume the risk by trusting to the assurances of the president, upon the circumstances of this case. The reply of the president was equivalent to telling the plaintiff that the company would not employ any other physician, and the plaintiff had to take the service offered him or go without medical treatment. The requests to charge were properly refused.

No error.

WALKER, J., and ALLEN, J., dissenting: There was a clear error in this instruction of the court: "If you shall find from the greater weight of the evidence that after the plaintiff was injured he asked Dr. Aldrich, the president and general manager of defendant, if he had not better send for another physician, and if you find that Dr. Aldrich then advised the plaintiff that it was unnecessary, that he and Dr. Smith could set the arm as well as any one; that it was only a simple fracture; then the court charges you he had a right to rely upon such assurance, and you will answer the fourth issue 'No.'"

The fourth issue and answer were: "Did the plaintiff assume the risk of the treatment by Dr. Smith for the injury complained of in this action? Answer: 'No.'"

The question under this issue was one of fact, whether plaintiff actually relied upon the assurance of Dr. C. S. Aldrich, or whether he did not do so, and thereby assumed the risk by acting upon his judgment and responsibility, whereas the court charged that if the doctor gave him the assurance, he had the "*right* to rely on it," and they will answer the fourth issue "No." It is manifest that the question was not whether he had the *right* to rely on the assurance of Dr. Aldrich, but whether he did rely upon it, and the importance of this distinction will more clearly appear, if it is not now sufficiently so, when we consider the evidence, for the plaintiff testified that while Dr. Aldrich gave him this assurance, he did not believe it. We are not contending there was no evidence that he relied upon it, but that the fact involved, whether he did or not rely upon it, was not submitted to the jury, and the finding of the jury in response to that issue was made to turn solely on his *right* to do so. Nor is the case as reported in 176 N. C., 645 (op. by *Brown, J.*), any authority to sustain such an instruction. There the finding was made to turn on the question whether he had actually relied upon the assurance and not solely, as here, upon his right to rely upon it. Besides, the Court was there referring only to the evidence and not to the charge, as plainly appears from the passage which the Court takes from that opinion, as follows: "There is evidence that plaintiff, some time before he was injured, complained to the president of the company of Dr. Smith's incompetence, and when he was injured the president assured him that he and Smith were fully competent to perform the operation, and that defendant, in submitting to the operation, relied upon such assurance, as he had a right to do." So we see that *this* point was not ruled upon in the former appeal. We therefore dissent from the judgment of the Court, as we are of the opinion there was error in the respect pointed out, which entitles defendant to a new trial.

The verdict was a directed one, as it was made to depend entirely upon the right to rely upon the assurance, which was held, as matter of law, to exist, and thereupon the jury were instructed to answer the issue "No." They could do nothing else under this charge.

NORFOLK SOUTHERN RAILROAD CO. v. S. J. SMITHERMAN.

(Filed 3 December, 1919.)

1. **Principal and Agent—Scope of Authority of Agent—Secret Limitations—Evidence—Declarations.**

   Secret limitations upon the authority of an agent to bind his principal contrary to the usual or apparent authority conferred upon agencies of like character, are not binding upon those dealing with such agent when unknown to them, and they are under no obligation to inquire into the agent's actual authority; and where they have dealt with the agent, relying upon his apparent authority in good faith, in the exercise of reasonable prudence, the principal will be bound by the agent's acts in the usual and customary mode of doing such business, though the agent may have acted in violation of his private instructions; but where the agent has acted beyond his apparent authority, his declarations of his authority to act may not be received as evidence against the principal, and the principal will not be bound thereby unless he has in some way ratified such act.

2. **Principal and Agent—Scope of Authority—Agent's Declarations—Past Transactions—Evidence—Railroads—Station Agents.**

   The local freight and passenger agent of a railroad company has no implied authority by virtue of such agency to surrender the possession of a part of its local depot or yards to the owner of the fee under his claim that the property had reverted, under his deed, to himself, by reason of its nonuser for general railroad purposes; and the declaration of the agent on a trial involving this question, that the railroad company, for which he was agent, had ceased to so use it are incompetent, and its admission is reversible error.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at April Term, 1917, of MONTGOMERY.

The plaintiffs alleged that defendants had trespassed upon certain land described in the complaint, and asks for damages. The defendants, T. J. Smitherman and wife, conveyed to the Durham and Charlotte Railway Company the land which is situated in the town of Troy, with the following *habendum* in the deed: "To have and to hold the aforesaid tract of land, with the appurtenances and every part thereof, unto the said party of the second part, its successors and assigns, to their proper use and behoof forever; to be used by the said party of the second part, its successors and assigns, for the purpose of erecting and maintaining thereon passenger and freight railroad station, and the proper appendages thereto, and to transact on said granted premises the usual operations and business of a common carrier of freight and passengers, and for no other purpose or purposes whatsoever." The deed also contained the following clause: "In the event the said parties of the second part, its successors and assigns, shall discontinue the use of the aforesaid granted station site for the purposes hereinbefore named, then, in that event, the aforesaid granted station site, with all the appurtenances thereto belonging, shall revert to the said parties of the first part, their executors, administrators, and assigns." The plaintiff, Norfolk Southern Railroad Company, has acquired all the rights which the Durham and Charlotte Railway Company had under said deed, subject to the restrictions of the *habendum* and clause of forfeiture above set forth.

The plaintiff claims the land and the structures thereon, consisting of station house, tracks, etc., which were placed there by the Durham and Charlotte Railway Company, and the defendants allege that the property, and all rights therein, have been forfeited by violation of the terms of the deed, whereby the same reverted to the defendants.

The jury returned the following verdict:

"1. Is the plaintiff, the Norfolk Southern Railway Company, the owner of the land described in the complaint, as alleged? Answer: 'No.'

"2. Did the defendant, prior to the commencement of this action, unlawfully enter upon the lands described in the complaint and commit a trespass thereon, as alleged? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendants for such unlawful entry and trespass, as alleged? Answer: 'Nothing.'

"4. Did the plaintiff unlawfully cause to be issued a restraining order out of this court restraining the defendants from entering upon the lands described in the complaint, as alleged in the answer? Answer: 'Yes.'

"5. What damage, if any, are the defendants entitled to recover of the plaintiffs for unlawfully causing such restraining order to be used as alleged? Answer: '$500.' "

Evidence was taken upon this issue, and, upon the examination of the defendants' witness, W. I. Myrick, he was permitted to testify to a statement of S. T. Brown, plaintiff's local agent at Troy, to the effect that the property no longer belonged to the railway company, and it would have nothing more to do with it, as it then was the property of Mr. Smitherman. Brown delivered the key of the old building to the witness at that time. Plaintiff's objection to this testimony was overruled.

There was evidence that the plaintiff had erected a new building on the premises, where it had its ticket office and received some freight, but that it still used the old building and its appurtenances for the heavier freight and received such freight and shipped it from that building. It had received freight at the old building from defendant Smitherman, goods which were manufactured in its cotton mill nearby, and shipped the same on cars which were loaded at the old building, and there was other evidence of the continued use of the old building for the purpose of storing and handling heavy freight, or "overflow freight," until this action was commenced on 23 August, 1912.

The court instructed the jury, under the issues submitted, to inquire and find whether the plaintiff had violated the stipulations of the deed and the clause of forfeiture, and gave these instructions, among others: "The burden is upon the defendant to satisfy you by the greater weight of the evidence that the plaintiff has ceased to use it for all purposes which they had a right to use it for under this deed; that is, ceased to use it for a passenger station and for a freight station; ceased to use appendages, the cartway, the car tracks, and any other appendages which you may find they had in connection therewith; ceased to use that property in any transaction usually conducted by a common carrier of freight and passengers, connected with it as a station. If the defendant has satisfied you that they have ceased all these functions, it would be your duty to answer the issue 'No'; that the plaintiff is not the owner of it. . . . If they have failed to so satisfy you, you will answer it 'Yes,' because the defendant in this case admits that the railroad is the owner of the property unless they have ceased to use it, as I have explained to you. . . . The plaintiff contends that up to 23 August, 1912, the date this action was commenced, it was in the actual use of that property as a railway station; that it was using the building itself and the appendages thereto as a freight station; that it was engaged in the transaction of business usually conducted by common carriers of passengers and freight in connection with that property as a freight station. The plaintiff contends that if you should find that it had removed its passenger station, and that if, before this time, it was selling tickets from the other office and receiving passengers there for trains going out and coming in, that even though you should find that its passenger service was conducted from the other station, it had not abandoned this property, and that it had done nothing to affect its rights. The court charges you that even though the railroad conducted a separate passenger service, if they continued to use this place as a freight station, then you will answer the issue 'Yes,' because so long as the railroad company continued to use it, either as a freight station or a passenger station, or continued to use the appendages there for the purpose of using that property as a freight station, then the property belongs to the railroad."

Judgment was entered upon the verdict. Plaintiff appealed.

Charles A. Armstrong and Tillett & Guthrie for plaintiff.
R. T. Poole and H. M. Robins for defendant.

WALKER, J., after stating the case as above: The question which the witness, W. I. Myrick, was allowed to answer was incompetent, and should have been excluded. Its admission was clearly prejudicial, and, considering the other testimony in the case, it doubtless controlled the jury in rendering the verdict for the defendant. The witness, S. T. Brown, mentioned in the question and answer, had no authority, express or implied, to surrender possession of the old building to the defendant, or to any one under their direction, nor was any declaration made by him to Myrick, as to what the plaintiff had done about that building, and to the effect that it had been surrendered to the defendants and belonged to them, admissible against the plaintiffs, who were his principal. He had no real or apparent authority to give up his principal's property, so far as this record shows, and certainly none to declare what the principal had done in the past respecting it. His duty was nothing more than that of a local passenger and freight agent, and nothing is disclosed to show, nor has it been submitted to the jury and found, that it was more than this. *Bank v. Hay*, 143 N. C., 326; *Brittain v. Westall*, 135 N. C., 492; *Metal Co. v. R. R.*, 145 N. C., 293. The plaintiff, as principal, has not ratified what the agent is alleged to have done, nor acquiesced therein, but on the contrary, has denied that the agent had any such authority. "Limitations which are known to a person dealing with an agent are as binding upon such person as they are upon the agent, and he can acquire no rights against the principal by dealing with the agent contrary thereto." 31 Cyc., 1329. While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant thereof, and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person, who, in order to avail himself of rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority. An agent cannot, however, enlarge the actual authority by his own acts without some measure of assent or acquiescence on the part of his principal, whose rights and liabilities as to third persons are not affected by any apparent authority which his agent has conferred upon himself simply by his own representations, express or implied. Although these rules are firmly established, their application to particular cases is extremely difficult. The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had under the circumstances conferred upon his agent. 31 Cyc., 1331-1335.

There is evidence that the defendant had freight in the old building for shipment at the time this action was commenced, and that it was used for the storage of heavy and overflow freight in connection with the new building, which was on the railroad premises not far away. But, however, the fact may be as to the authority of the agent to surrender the property, his declaration to Myrick, if made, was incompetent to prove it. We have seen that he cannot enlarge his authority by his own declarations, and this Court has recently stated that "the authorities in this State are all to the effect that declarations of an agent made after the event, and as mere narrative of a past occurrence, are not competent against the principal." *Johnson v. Ins. Co.,* 172 N. C., 142, citing *Smith v. R. R.,* 68 N. C., 115; *Rumbough v. Improvement Co.,* 112 N. C., 751; *Morgan v. Benefit Society,* 167 N. C., 265.

The error in admitting this evidence, without other proof extending the authority of the agent beyond its implied or apparent limitation, entitles the plaintiffs to another trial, and it will be so certified.

New trial.

JACOB W. DEAL v. GEORGE W. WILSON.

(Filed 3 December, 1919.)

1. **Contracts—Statute of Frauds—Void Contracts—Quantum Meruit—Quantum Valebat—Specific Performance.**

   Where a verbal contract to convey land is void under the plea of the statute of frauds, and the grantee, in pursuance thereof, has rendered services and been put to expense, and the grantor has then refused to make the conveyance he had obligated himself to make, the grantee, having been induced by the grantor's promise, may recover as upon a *quantum meruit* the value of the services he has rendered, and in money or money's worth, and for the loss he has been directly occasioned by reason of the vendor's breach, though he is not entitled to specific performance.

2. **Contracts—Statute of Frauds—Breach—Actions.**

   The purchaser's action will immediately lie to recover upon a *quantum meruit* for his services rendered under a verbal contract to convey lands, void under the statute of frauds, upon the seller's refusal to make the deed agreed upon in the said contract.

3. **Contracts—Evidence—Statute of Frauds—Breach.**

   In this action to recover for services rendered and moneys expended under a verbal contract to convey lands, void under the statute of frauds, it is *Held*, that what the defendant said, either to the plaintiff or to others, relative to the contract, is competent evidence against him.

4. **Same—Compensation—Specific Performance.**

   Testimony explanatory of a parol contract to convey lands, void under the statute of frauds, merely tending to show the plaintiff's equitable right to recover compensation growing out of its breach and not for the purpose of enforcing specific performance or for damages because of its breach, is competent.

CIVIL ACTION, tried before *Webb, J.*, and a jury, at May Term, 1919, of CATAWBA.

Plaintiff sued to recover damages for a breach of contract by which, as he alleges, the defendant agreed that if the plaintiff would give up his business and dispose of his property and move to defendant's farm, where the latter lived, cultivate the same and take care of and support the defendant and wife during their lives, the defendant would presently convey his property to him; that plaintiff accepted the proposal, sold out his property, abandoned his own ordinary work, and went to the defendant's place, where he proceeded to work, and in all other respects to perform his part of the contract, upon faith in the defendant's promise that he would at once convey the property to him. That defendant failed to do what he had promised to do, and put off the plaintiff from time to time with one excuse and another, and finally refused to convey the property as stipulated. The plaintiff thereupon refused to continue what he had been doing in fulfillment of his part of the agreement, and left the defendant's premises, after he found that it was futile to wait any longer for defendant to act or to expect him to keep his promise. He sues, not to enforce the specific performance of the contract to convey the property of defendant to him, nor for damages because of defendant's breach of the contract in this respect, but solely for the value of the services rendered by him in performing his part of the contract, and for what he laid out in money, or money's worth, at the special request of defendant, while he was attempting to do his part in the transaction, of which defendant received the benefit. The defendant denied the contract, and relied on the statute of frauds, objecting to evidence of the oral contract, and to the charge of the court in regard to it.

The court confined the issues to the contract made between the parties and the amount of the recovery, and refused to submit issues tendered by the plaintiff, and there was no issue involving an enforcement of the contract to convey the land, or damages for its breach. The referee found with the plaintiff, and assessed his damages, or the value of services rendered and money advanced, at $1,787.03, and from the judgment of the court thereon, after overruling defendant's exceptions, defendant appealed.

C. L. Whitener and W. A. Self for plaintiff.
Councill & Yount for defendant.

WALKER, J., after stating the case as above: The question on this appeal seems to be easy of solution when it is properly and clearly understood. It is not sought by the plaintiff to enforce specifically the contract of sale, nor to recover damages for a breach of the contract, but the whole basis upon which his claim rests is that by reason of the promise of the defendant to convey his property upon the considerations stated, he was induced to lay out money, and to perform services, for which he seeks compensation. It would appear very strange if, under the law, he is not entitled to this relief, as the justice of his demand is very manifest, and the law, as we think, is strongly with him.

The principle upon which a recovery may be had in a case like this is firmly established by the authorities. The subject is fully treated in 20 Cyc., pp. 298-303, where it is said that where services are rendered on an agreement which is void by the statute, an action will lie on the implied promise to pay for such services, and the terms of the contract are admissible as evidence of what those services are worth. Where a defendant has successfully resisted the specific performance of a contract, he will not be allowed to set up such contract as binding in order to defeat an action brought to recover money paid in pursuance of said avoided contract. *Pendleton v. Dalton,* 92 N. C., 185. And so, in *Wilkie v. Womble,* 90 N. C., 254, and *Kelly v. Johnson,* 135 N. C., 647, it was held that where a vendor repudiates a parol contract to convey land, the vendee is entitled to recover the amount he has paid under the contract. But this case is absolutely ruled by that of *Faircloth v. Kenlaw,* 165 N. C., 228. We there said that where the defendant has promised, in consideration of services to be rendered, that he will transfer to the plaintiff certain property, which he afterwards refuses to do, and, instead of fulfilling his contract, sets up the statute of frauds as a bar to any recovery on the same, he acts in bad faith, and his conduct having deceived the plaintiff, who, relying upon the assurance that the contract would faithfully be performed, had been induced to part with his money or to render services of value to the defendant, the latter may recover compensation for the loss he has sustained. It is a just and salutory principle of the law that every man is bound to the observance of good faith in his dealings with others, and, at least, to the extent that, as he knows, he is trusted, which may be inferred from the nature of the transaction, and when he induces another to act upon such confidence in him, and betrays it, where the latter has advanced money or performed services, and will sustain damage if the contract is not carried out, the injured party may recover for the loss.

We there said: "Under such circumstances, while it is unquestionably true that no action can be maintained, either to recover damages for the loss of the land or a good bargain, or for a specific performance, yet to hold that the action cannot be sustained to recover for the injury or loss already named would be equivalent to saying that the subject was one in regard to which either fraud or bad faith could not be practiced, or could be, with impunity. *Frazer v. Howe,* 106 Ill., at p. 563. It is well settled by the authorities that where payments are made or services rendered upon a contract void by the statute of frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments, or the value of the services, in an action upon an implied assumpsit. A party who refuses to go on with an agreement void by the statute of frauds, after having derived a benefit from a part performance, must pay for what he has received," citing *Galvin v. Prentice,* 145 N. Y., 162; *King v. Brown,* 2 Hill (N. Y.), 485, at 487; *Lockwood v. Barnes,* 3 Hill (N. Y.), 128.

The same was decided in *Williams v. Bemis,* 108 Mass., 91, where there was a lease within the statute of frauds, which defendant pleaded. The Court held that the plaintiff could maintain an action for work and labor done, money advanced, materials furnished in cultivating the land, or in performing the contract on his part, notwithstanding the bar of the statute, as he did not seek to enforce the contract specifically or to recover damages for a breach thereof. It was said by the Court: "The true principle is this: The contract being void and incapable of enforcement in a court of law (defendant having refused to perform it), the party paying the money or rendering the services in pursuance thereof may treat it as a nullity, and recover the money or value of the services under the common counts. . . . If it had been a payment in money it would be too plain to be controverted. A payment in labor and service, of which the other has secured the benefit, stands upon the same ground."

The case of *In re Estate of Kessler,* 87 Wisc., 660, is to the same effect, for there the Court held that a parol agreement to devise and bequeath real and personal property as compensation for services rendered by a relative, is within the statute of frauds, as to the real estate, and, the contract being indivisible, the whole agreement fails. But in such case the relative may recover for his services what they may appear to have been reasonably worth, and such void agreement may be shown in evidence to rebut the presumption that they were rendered gratuitously. "It is a most important principle, thoroughly established in equity, and applying in every transaction, where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud, or in the consummation of a fraudulent scheme," quoting from 2 Pomeroy's Equity Jur. (3 Ed.), sec. 921. See, also, *Woodbury v. Gardner,* 77 Me., 68, and *Wood v. Rabe,* 96 N. Y., 414, where the same section of Dr. Pomeroy is cited with approval and relied on. It is further said by Dr. Pomeroy, in the same connection: "This most righteous principle lies at the basis of many forms of equitable relief." See, also, *King v. Hunt,* 1 Pick. (Mass.), 328, 331; *Lane v. Shookford,* 5 N. H., 130; *Gillet v. Maynard,* 5 Johns. (N. Y.), 85; *Vandersen v. Blum,* 18 Pick., 229. The English case of *Gray v. Hill Ry. & Mood.,* 420 (op. by *Best, C. J.*), held that where the defendant, in consideration of certain repairs to be made by the plaintiff, agreed to assign a lease to him, and after the repairs were made, refused to make the assignment, and set up the statute of frauds as a defense, the law implied a promise to pay for the repairs, and this implied promise was "not touched by the statute." 11 Amer. Reports, at p. 319.

It is stated in Browne on the Statute of Frauds (5 Ed.), sec. 118: "One who has rendered services in execution of a verbal contract which, on account of the statute, cannot be enforced against the other party, can recover the value of the services upon a *quantum meruit.*" *Judge Bryan,* in *Baker v. Lauterbach,* 68 Md., 64, at p. 70, expresses the principle with great force and accuracy: "It must be observed that although contracts within the statute of frauds are void unless they are in writing, yet the voluntary performance of them is in no respect unlawful. If services be rendered in pursuance of a contract of this kind by one party, and be accepted by the other, they must be compensated," citing *Ellicott v. Peterson,* 4 Md., 491.

A rule, based upon the same reason, has often been applied in this Court, where a party has entered into the possession of land and made valuable improvements under a parol contract of the owner to convey the same to him. We have uniformly held that the owner, if he repudiates the contract, must pay for the improvements to the extent that they have enhanced the value of the land. *Albea v. Griffin,* 22 N. C., 9; *Hedgepeth v. Rose,* 95 N. C., 41; *Tucker v. Markland,* 101 N. C., 422; *Vick v. Vick,* 126 N. C., 123. See, also, *Dunn v. Moore,* 38 N. C., 364; *Winton v. Fort,* 58 N. C., 251; *Sain v. Dulin,* 59 N. C., 196; *Thomas v. Skyles,* 54 N. C., 302; *Love v. Neilson, ib.,* 339; *Barnes v. Brown,* 71 N. C., 507; *Kelly v. Johnson,* 135 N. C., 647.

Judge Gaston stated the principle strongly and impressively in *Albea v. Griffin, supra:* "The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury. If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property," citing *Baker v. Carson,* 21 N. C., 381, where *Ruffin, C. J.,* said: "To hold that there is no relief, either in law or in equity, that a man may be stripped of the entire fruits of his toil for years by any one who can cajole him into the weakness of expending them on his land by assurances for a future title, is a doctrine which seems to be subversive of first principles. . . . This case, on the contrary, is founded on the equity of the plaintiff against the defendant, as the owner of the estate, who takes it away, with its improvements made by the plaintiff. The relief goes upon her unconscientious gains. True the plaintiff sets forth the contract, and asks for its performance. But that is not an alternative in the sense before spoken of. It was necessary for him to do so that he might offer an acceptance on his part, without which he would have no equity; for he would have no right to compensation, if the defendant were willing to let him enjoy the fruit of his labor. He must, therefore, give her the election. Having elected to take the land, the defendant ought to pay the plaintiff, not for the land, nor damages for a breach of the agreement, but for his labor, of which she fraudulently reaps the profits." That states clearly the equitable basis upon which this whole doctrine rests.

There was some criticism of *Thomas v. Skyles, supra,* and *Love v. Neilson, supra,* but *Judge Battle* explains it away in *Sain v. Dulin, supra.* It arose upon a question of jurisdiction, namely, whether, under the old system, the suit should have been brought at law or in equity (*Warren v. Dail,* 170 N. C., 406), but this technical distinction is abolished by our present Constitution and reformed procedure, and the principle, which we have applied to this case, is left unimpaired, as it is stated in the authorities cited above.

The unanimity with which the courts of the other States recognize this doctrine, though expressed in varying forms, will appear from the following cases, the substance of each being in effect to adopt the principle as it is stated in *Hamilton v. Thirston,* 93 Md., 213, 220, that, although the plaintiff is not entitled to maintain an action upon the alleged contract (if the statute is pleaded), he can recover upon a *quantum meruit* the value of the services rendered by him to his uncle for the latter's benefit, for from services of this kind, even when rendered in pursuance of a contract within the statute by one party and accepted by the other, a right to compensation arises. *Murphy v. DeHaan,* 116 Iowa, 61; *Wonsetter v. Lee,* 40 Kansas, 367; *Snyder v. Neal,* 129 Mich., 692; *Spinney v. Hill,* 81 Minn., 316; *Sims v. McEwen Admr.,* 27 Ala., 184; *Howe v. Day,* 58 N. H., 516; *Patten v. Hicks,* 43 Calif., 509; *W. B. Steel Works v. Atkinson,* 68 Ill., 421; *Miller v. Eldridge,* 126 Ind., 461; *White v. Weiland,* 109 Mass., 291; *Moody v. Smith,* 70 N. Y., 598, and others to be found collected in 20 Cyc., at p. 299, note 52. 2 Reed's Statute of Frauds, sec. 624. The Court said, in *Murphy v. DeHaan, supra,* at p. 63, that the statute was not enacted for the purpose of aiding one in the perpetration of a fraud, but to secure him from the consequences thereof. It was intended as a shield, and not as a sword. According to the evidence, defendant had the benefit of plaintiff's services, and he cannot be heard to say that they were performed under a contract which would have been invalid had it remained executory in character. To the same effect is *Threadgill v. McLendon,* 76 N. C., at p. 26.

In *Snyder v. Deal, supra,* it was held that where plaintiff rendered services for defendants under an agreement, that she should be compensated therefor at their death, which agreement defendants subsequently repudiated, plaintiff could maintain an action *at once* for the value of the services. This last case answers the objection that this action was prematurely brought.

As to the questions of evidence. What the defendant said about the contract was, without doubt, competent against him, whether said to plaintiff or to others.

The testimony as to the parol contract was merely explanatory of the transaction, and was not admitted to charge the defendant upon the same, either for its specific enforcement or for damages because of its breach, but merely as tending to show plaintiff's equitable right to recover compensation growing out of it.

The charge of the court is wholly free from any error, and the nonsuit was properly denied, as the evidence was sufficient to support the findings of the referee and the judgment.

No error.

M. W. LOFTIN ET AL. v. W. F. ENGLISH.

(Filed 10 December, 1919.)

Wills—Devise—Estate—Trusts—Survivor—Deeds and Conveyances—Estoppel.

A devise of lands to the executor in trust for the testator's three children, to be used by them for a home until one of them survived, and then to be conveyed by the executor to him in fee: *Held*, whether the children took a contingent or vested remainder, the deed of the three *cestuis que trustent*, joined in by the trustee, conveyed a fee simple absolute title to the purchaser, the deed estopping the heirs of the survivor.

CONTROVERSY without action, heard by *Connor, J.*, at chambers in WAYNE. (Time not stated in record.)

From a judgment for the plaintiffs the defendant appealed.

Hood & Hood for plaintiffs.
No counsel contra.

BROWN, J. The plaintiffs contracted to sell to the defendant a certain lot of land situated in the town of Mount Olive. The question presented relates to the title. The property was devised to the plaintiff, Major Loftin, upon the following trust: "He shall hold the same as a house for my three children, J. Annie Flowers, Fannie E. Westbrook, and Ernest B. Flowers, which they shall use and occupy free of rents until but one of them survives; then he shall convey the same to such survivor in fee, absolutely."

The trustee, together with the three *cestuis que trustent*, Mrs. Flowers, Mrs. Westbrook, and Ernest B. Flowers, together with the husbands of the two *femes covert*, and the wife of Ernest B. Flowers, all have executed and tendered a proper deed in fee simple to the defendant, who has agreed to purchase the land. He declines to accept the deed and pay the purchase money upon the ground that the title is not good. It is immaterial whether, under the clause of the will above quoted, the three children of the testatrix took a contingent remainder or a vested remainder. It is perfectly plain that in any event the title must vest absolutely in the survivor of the three.

Under the specific language of the will, the trustee is required to convey the property to the survivor in fee absolutely. The trustee and all three of the children have executed the deed. There can be no question that this deed will convey to the purchaser an estate in fee simple, and that the survivor of the three children will be estopped from claiming against it. *Kornegay v. Miller,* 137 N. C., 659; *Watts v. Griffin,* 137 N. C., 572; *Beacomb v. Amos,* 161 N. C., 357.

The judgment is
Affirmed.

MOSES HILL, BY HIS NEXT FRIEND, W. L. RAY, v. THE DIRECTOR-GENERAL OF RAILROADS AND THE NORTH CAROLINA RAILROAD COMPANY.

(Filed 10 December, 1919.)

1. **Railroads—Lessor and Lessee: Torts of Lessee.**

A lessor railroad company is responsible for the torts committed by the lessee in the operation of the leased road, and in the exercise of its franchise, in the absence of legislation controlling the matter to the contrary.

2. **Removal of Causes—Diversity of Citizenship—Motions—Issues of Fact—Jurisdiction.**

On motion of a nonresident defendant to remove a cause from the State to the Federal Court, under the Federal act, for diversity of citizenship, the plaintiff's cause of action, as a legal proposition, must be considered and dealt with as he has presented it in his complaint, and not otherwise.

3. **Same—Federal Control—Director-General of Railroads—Statutes.**

Where a cause of action for a tort, brought by a citizen of this State, is alleged solely against a domestic corporation, and the Federal Director of Railroads, a nonresident, has been made a party defendant, as having control of the defendant railroad, he may not on that ground sustain a motion to remove the cause for diversity of citizenship, such expressly being prohibited by the Federal statute; nor may he do so upon the ground that he has also control of the nonresident lessee railroad corporation, not a party to the action; especially is this so when the superintendent of the defendant railroad, as representative of the Director-General, has appeared and obtained a stay of the action on the ground that, under and by virtue of his own order such suits, for the present, may be instituted only against him.

4. **Removal of Causes—Petition—Controverted Facts—Legal Inferences—Courts—Jurisdiction.**

While the allegations in the petition to remove a cause from the State to the Federal Court are a part of the record and considered as true upon the hearing of the motion in the State courts, and all controverted facts are to be determined in the jurisdiction of the Federal Court, this does not apply when the real facts are not controverted, and there is a controversy raised only by an allegation in the petition based upon the petitioners' erroneous legal estimate of facts appearing in other portions of the record.

5. **Removal of Causes—Diversity of Citizenship—Federal Control—Director-General of Railroads—Railroads—Lessor and Lessee—Foreign Railroads—Motions.**

Where the complaint of a resident plaintiff states a cause of action arising in tort against a domestic railroad company, the lessor of a foreign railroad corporation, operating the same under the charter, and the Director-General, a nonresident, appears and obtains a stay of the action, upon the ground that it could only be maintained against him in his official capacity, he may not thereafter successfully contend that the cause should be removed to the Federal Court for diversity of citizenship because he was also in official control of the lessee railroad, a nonresident corporation, not a party to the action.

6. **Removal of Causes—Diversity of Citizenship—Pleadings—Allegations—New Parties—Motions.**

Semble, the Director-General of Railroads, who has procured a stay of an action brought by a resident of this State against a domestic lessor railroad corporation, for the tort of its lessee, a foreign corporation not a party, may not maintain his motion to remove the cause to the Federal Court for diversity of citizenship between the plaintiff and the nonresident lessee, the complaint alleging the cause of action solely against the resident corporation and the Director-General having been made a party at his own instance alone.

MOTION to remove action to the Federal Court, heard before *Adams, J.*, at September Term, 1919, of ROWAN.

There was judgment in denial of the motion, and the defendant, the Director-General of Railroads, excepted and appealed.

J. C. Busby and A. H. Price for plaintiff.
Linn & Linn for defendant.

HOKE, J. Plaintiff, a citizen and resident of North Carolina, institutes this action against the North Carolina Railroad Company, a domestic corporation, and the Director-General of Railroads, as having charge of same under the Federal statutes and executive proclamations and orders applicable, to recover damages for physical injuries wrongfully suffered by plaintiff of the defendant from the negligent operation of defendant's road in Rowan County, N. C., by its lessee, the Southern Railway Company, a Virginia corporation. Having filed his complaint, setting forth facts of the occurrence, and containing full averment of the liability of the defendant company, the latter, at return term, entered a special appearance and moved to dismiss the action as against the defendant company, for that, in the language of the motion: "It is not a proper defendant in the cause; that on 1 January, 1918, the possession and control and operation of its railroad was taken over by the United States Government, and has been so held and operated since that day by the Director-General of the United States, under an act of Congress, order No. 50 A of said Director-General, provides that suits of this kind shall be against the Director-General of Railroads and not otherwise."

The portion of the order applicable to the precise question presented being in terms as follows: "No. 50 A. It is therefore ordered that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court, based on contract binding upon the Director-General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since 31 December, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director-General of Railroads, which action, suit, or proceeding, but for Federal control, might have been brought against the carrier company, shall be brought against the Director-General of Railroads, not otherwise: *Provided, however,* that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties, and forfeitures." In support of the motion, defendant also filed the affidavit of A. D. Shelton, superintendent of the road from Salisbury to Goldsboro, and from Salisbury to Monroe, Virginia, in terms as follows: "That he holds his said position under the Director-General of Railroads of the United States; that since December, 1917, the North Carolina Railroad has been under the control and operation of the Director-General of Railroads, pursuant to an act of Congress of the United States; that said railroad is not being operated, nor has it been operated since December, 1917, either by the North Carolina Railroad Company or by its lessee, the Southern Railway Company, but each and every act pertaining to the operation of the said railroad has been under the direction, control, and supervision of the Director-General of Railroads of the United States and his agents. That at the time of the injury complained of in plaintiff's complaint, the defendant, the North Carolina Railroad, was under the control, management, and operation of the Director-General of Railroads for the United States, and affiant, as superintendent under the said Director-General, was the superintendent in control and operation of the said railroad."

On motion to dismiss, the court made an order that the action for the present be stayed as to defendant company, and allowed to proceed "as to the Director-General of Railroads in control of the lessor of the Southern Railway, and, to that extent, the said motion is denied." Thereupon, and on notice duly served, the defendant, the Director-General filed his bond and verified petition for removal of the cause to the District Court of the United States, and alleging: "That petitioner, as Director-General of Railroads, operating and controlling the Southern Railway Company, a corporation originally created, organized, and existing under the laws of Virginia, is now the only defendant in the suit or civil action begun against it in the Superior Court of Rowan County, N. C., etc. That said suit is for $20,000 damages for negligent injury alleged to have been sustained at or near Salisbury, N. C. That the controversy is wholly between plaintiff and his next friend, citizens and residents of North Carolina, and the defendant, 'a citizen of New York, operating and controlling a corporation originally created, organized, and existing under and by virtue of the laws of Virginia, and was, at the commencement of this action, and still is, a citizen of the State of Virginia, and not a citizen or resident of the State of North Carolina.' "

Upon these, the facts presented in the record and pertinent to the inquiry, the motion for removal was denied, and defendant, the Director-General, excepted and appealed.

It has been uniformly held with us, and the principle applied directly to the lease of defendant company, that where a railroad corporation leases its road to another, in the absence of an exemption clause in the charter, or other legislative provision controlling the matter, the lessor is responsible for the torts committed by the lessee in the operation of the leased road, and in the exercise of its franchise. *Mitchell v. Lumber Co.,* 176 N. C., p. 645; *Mabry v. R. R.,* 139 N. C., p. 388; *Hardin v. R. R.,* 129 N. C., p. 354; *Logan v. R. R.,* 116 N. C., p. 940; *Aycock v. R. R.,* 89 N. C., p. 321.

Authoritative cases on the subject of removal are to the effect that, on motions of this kind, the plaintiff's cause of action, as a legal proposition, must be considered and dealt with as he has presented it in his complaint, and not otherwise. *Gurley v. Power Co.,* 173 N. C., pp. 447-449, citing in support of the position *R. R. v. Miller,* 217 U. S., p. 209; *R. R. v. Thompson,* 200 U. S., p. 206; *R. R. v. Dixon,* 179 U. S., p. 131; *Rea v. Mirror Co.,* 158 N. C., pp. 24 and 27; *Hough v. R. R.,* 144 N. C., p. 704; *Tel. Co. v. Griffith,* 104 Ga., p. 56; *R. R. v. R. R.,* 52 N. J. Eq., p. 58; Fed. Judicial Code, sec. 29.

The act of Congress applicable, and under which the Director-General professes to have taken over the control and management of the road, being an act of the 65th Congress, entitled "An act to provide for the operation of transportation systems while under Federal control," approved 21 March, 1918. 40 U. S. Statutes at Large, part 1, p. 457, contains, among others, the following provision, being the former portion of section 10:

"That carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act, or any other act applicable to such Federal control, or with any order of the President. Actions at law, or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferrable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control, or of any act of Congress or official order or proclamation relating thereto, shall, upon motion of either party, be transferred to the court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control." And we are of opinion that the provisions of this statute, and the principles approved in the decisions cited, and others of like purport are in full support of his Honor's judgment denying the application for removal. So far as the Southern Railway is concerned, alleged to be a Virginia corporation, it has never been made a party, and its citizenship should not be allowed to affect the question. Moon on Removal of Causes, sec. 114. And as to defendant, the Director-General, he is only a party as having control and management of the defendant road that is sued. Not only does this follow from the fact that plaintiff only states a cause of action against the domestic corporation, but defendant himself, through his appointee, the superintendent, alleged by him to be in charge and control of the road under and by virtue of the act of Congress, appears and obtains a stay of the action as to defendant road on the ground that, under and by virtue of his own order, such suits, for the present, may only be prosecuted against him. True, in proceedings of this character, the petition is regarded as a part of the record, and so far as the State Court is concerned, the relevant facts alleged therein must be accepted as true. If plaintiff desires to controvert them, he must do so in the Federal Court after removal. But the only *facts* averred in this petition are as to the citizenship of the Director-General as an individual, and that of the Virginia corporation, neither of which is denied. The further allegation that, since the stay there only remains "a controversy wholly between citizens of different States, to wit, a controversy between your petitioner, a citizen of New York, operating and controlling a corporation, a citizen and resident of Virginia, and plaintiff, a citizen and resident of North Carolina," is not the averment of a fact, but the petitioner's legal estimate of facts appearing in other portions of the record. From such facts it appears that plaintiff has only stated a cause of action against the North Carolina Railroad, a domestic corporation. Under the authorities cited, he is entitled to have his rights determined in that aspect, and there is nothing to justify defendant in his attempted departure from the cause of action so stated, and setting up the position that he can defend as being in the control and management of the Southern Railway, a corporation of the State of Virginia. Furthermore, having become a party and accepted the position of defending the suit as being in the management and control of defendant, obtained a stay of proceedings against the corporation under an order that such suits are to be conducted against him in his official capacity, he should not be allowed to change his attitude and undertake a resistance as being in charge of the Virginia company. *McCarty v. R. R.,* 96 U. S., 258; *King v. R. R.*, 176 N. C., 301-306; *Lindsay v. Mitchell,* 174 N. C., 458; *Brown v. Chemical Co.*, 165 N. C., 421.

In our view, therefore, and accepting all the facts in the petition for removal as true, the defendant, the Director-General, must be considered a party only as being in the management and control of the defendant railroad; that, on a petition for removal, he must accept the cause of action as plaintiff has stated it in his complaint, and, this being against a domestic corporation, the case comes within the provision and purport of the act of Congress referred to, prohibiting a removal to the Federal Court, all causes which "were not so transferrable prior to Federal control," etc. Even if it were open to defendant to interpret plaintiff's cause of action as one against defendant road, a domestic corporation, and the Director-General, a citizen of New York, in the management and control of a Virginia corporation, thus presenting an action for a joint wrong against the two defendants, stayed by order of the Court as to the resident defendant, at the instance of the petitioner and by virtue of his order, made in the management and control of the transportation lines taken over by the Government, the authorities seem to be against the right of removal. In the case of *Gurley v. Power Co.*, before referred to, the Court said: "Under the Federal statutes applicable, and authoritative decisions construing the same, on motion to remove the cause to the Federal Court, by reason of the presence of a severable controversy between plaintiff and a nonresident defendant, such plaintiff is entitled to have his cause of action considered and dealt with, as stated in the complaint, and, ordinarily, as his complaint presents it, at or before the time when the defendant, the applicant, is required to answer," citing *R. R. v. Miller,* 217 U. S., 209, and other cases. Under the present statute, we find no decision which justifies a departure from these requirements by reason of changes subsequently occurring in the record unless these changes have been brought about by the voluntary action of the plaintiff himself, as when he voluntarily discontinues his action against the resident defendant, the case presented in *Powers v. R. R.,* 169 N. C., 92, or by amendment subsequently made, he states a separable controversy when none had been originally presented, as in *Fritzlen v. Boatmen's Bank,* 212 U. S., 364, and citing for the position, *Brooks v. Clark,* 119 U. S., 502; *Putnam v. Ingraham,* 114 U. S., 57; *American Car, etc., Co. v. Kettledrake,* 236 U. S., 311; *Lathrop, etc., Co. v. Interior Cars Co.,* 215 U. S., 246, and other cases.

In *American Car Co. case, supra, Associate Justice Day,* after reviewing some of the decisions on the subject, said: "Taking these cases together, we think it fairly appears from them that, when there is a joint cause of action against defendants, a resident in the same State with plaintiff, it must appear to make the case a removable one as to nonresident defendant and resident defendants because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of plaintiff, and that such action has taken the resident defendants out of the case so as to leave a controversy wholly between the plaintiff and the nonresident defendant."

While these authorities, as stated, would seem to be against the right of removal in any aspect of the record, we may well rest our approval of his Honor's ruling on the position that plaintiff, in his complaint, has stated a cause of action against the North Carolina Railroad, a domestic corporation, and has made the Director-General a party, and he is a party by reason of being in the management and control of that company. That on a petition of this kind he must accept the plaintiff's demand as he presents it in his complaint, and, in such case, by the terms of the statute under which he acts, the right of removal is expressly prohibited.

There is no error, and judgment of his Honor denying the application is

Affirmed.

F. B. INGOLD ET AL. v. THE CITY OF HICKORY ET AL.

(Filed 10 December, 1919.)

Liens—Materialmen—Laborers—Principal and Surety—Contractor's Bonds—Municipal Buildings.

The policy of our law with respect to mechanics and laborers' liens upon buildings being built, etc., as evidenced by our statutes and decisions thereon, is to give protection to creditors of this class by remedying defects found in existing laws; and the Laws of 1913 and 1915, Gregory's Supplement to Pell's Revisal, sec. 2020-A. p. 2019, expressly provides for laborers and materialmen a right of action against the surety on the contractor's bond for the erection of a municipal building, and any provision incorporated in bonds of this character that takes away this right are contrary to our public policy and the express provisions of our statute, and void.

APPEAL by defendant from *Webb, J.*, at the May Term, 1919, of CATAWBA.

This is an action brought by the plaintiff against Charles A. Kline, the city of Hickory, and the American Surety Company of New York, for material furnished to the defendant, Charles A. Kline, for the erection of a school building for the defendant, the city of Hickory. The real purpose of the action is to hold the defendant, the American Surety Company, liable for the claims of the plaintiffs, on account, and by virtue, of a bond executed by the defendant, the American Surety Company, to the defendant, the city of Hickory, in the sum of $3,500. No judgment was taken by the plaintiffs against the defendant, Charles A. Kline, and at the close of the plaintiff's testimony a nonsuit was granted by the court as against the defendant, the city of Hickory. There was judgment for the plaintiffs against the defendant, the American Surety Company of New York, for $3,500, the amount of the bond above referred to, same to be discharged upon the payment of the plaintiff's claims, and the defendant, the American Surety Company, appealed. The defendant Kline entered into a contract with the city of Hickory for the erection of a school building, and executed a bond to the city of Hickory with the American Surety Company, one of the defendants herein, as surety.

There is no controversy as to the amount due the plaintiffs for materials furnished to erect the school building.

The parts of the bond necessary to be set out are the conditions and section 5, which are as follows:

Conditions of bond:

"Now, therefore, the condition of this obligation is such that if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform and discharge his duties thereunder, in the payment and satisfaction of all claims and liens for labor and material furnished in the erection of said building under and by virtue of section 2020 A, p. 2019, Gregory's Supplement to Pell's Revisal, vol. 3, session North Carolina Legislature 1913, and chapter 191, Laws 1915, and shall save harmless and fully indemnify the obligee against any and all loss that may accrue for labor or material under and by virtue of the laws of North Carolina, then this obligation shall be void; otherwise to remain in full force and effect: *Provided, however,* and upon the following express conditions, the performance of each of which shall be a condition precedent to any right to recovery hereon."

Section 5 of bond:

"Fifth. That no right of action shall accrue by reason hereof, to or for the use or benefit of any one other than the obligee herein named; and that the obligation of the surety is, and shall be construed strictly as one of suretyship only, shall be executed by the principal before delivery, and shall not, nor shall any interest therein or right of action thereon, be assigned without the prior consent, in writing, of the surety."

The defendant moved to dismiss the action upon the ground that the complaint does not state a cause of action in behalf of the plaintiffs for that:

"1. No one can sue on the bond under section 5 except the city of Hickory, named therein as obligee.

"2. That the bond shows on its face that it was not executed under section 2020-A of Gregory's Supplement because the penalty is only $3,500 when it should have been about $6,500 under this statute.

"3. It is not shown the city of Hickory owes the contractor anything, and there is no contractual relations between plaintiffs and defendant.

"4. That plaintiffs did not give the notice to the city required by section 2020 of Revisal."

A. A. Whitener for plaintiffs.
Harry K. Wolcott and Walter C. Feimster for defendant.

ALLEN, J. The public policy of this State, relating to claims for labor done and materials furnished, is shown in its legislation, and in the constant effort to remedy defects found in existing law, and to secure the payment of these claims.

The first statute (chapter 117, Laws 1868-9) regulated the filing and enforcement of the lien, but soon after its enactment "It was held by the Supreme Court that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor (*Wilkie v. Bray,* 71 N. C., 205), and as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner.

"The next step was the act to give subcontractors a lien (chapter 44 Special Session of 1880), which, with the act amendatory thereof (chapter 67, Laws 1887), is now sections 2019 to 2023, inclusive, of the Revisal." *Mfg. Co. v. Andrews,* 165 N. C., 292.

These statutes have been repeatedly sustained, but their operation has been confined to buildings not erected for a public use, such as schoolhouses, etc., and no lien can be secured or enforced against such buildings. *Hardware Co. v. Graded Schools,* 150 N. C., 680, and other cases.

After these decisions the General Assembly, for the purpose of supplying the defect, then enacted the statute now before us (chapter 150, Laws 1913, as amended by chapter 191, Laws 1915, now section 2020-A of Gregory's Supplement), which is as follows:

"Every county, city, town, or other municipal corporation which shall let a contract for the building, repairing, or altering any building, shall require the contractor for such work (when the contract price exceeds five hundred dollars) to execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town, or other municipal corporation, and conditioned for the payment of all labor done on, and material and supplies furnished for, the said work. . . . Any laborer doing work on said building, and materialman furnishing material therefor and used therein, shall have the right to sue on said bond, the principal and sureties thereof, in the courts of this State having jurisdiction of the amount of said bond, and any number of laborers or materialmen whose claims are unpaid for work done and material furnished in said building, shall have the right to join in one suit upon said bond for the recovery of the amounts due them respectively."

The statute is plain, and leaves no reason for construction. It requires the city, etc., to take a bond with surety "conditioned for the payment of all labor done and material and supplies furnished for the said work," and it provides that all laborers and materialmen may unite in one action "to sue on said bond."

The defendant is not only presumed to know the law, but it has substantially incorporated the statute in the bond by reference to it, and to permit it to insert stipulations, which would destroy its legal effect, or to hold that slight deviations as to form invalidate the bond, would put it in the power of cities, etc., erecting public buildings, and the surety company, to defeat the purpose of the statute by contract, in the absence of the laborer and materialman, for whose benefit the statute was passed.

"A person may lawfully waive by agreement the benefit of a statutory provision. But there is an imputed exception to this general rule in the case of a statutory provision, whose waiver would violate public policy expressed therein, or where rights of third parties, which the statute was intended to protect, are involved." 9 Cyc., 480, quoted with approval in *Lumber Co. v. Johnson,* 177 N. C., 49.

This authority is conclusive against the defendant upon its principal defense, under section 5 of the bond, which is not only opposed to the public policy of the State as declared in various legislative acts, but also in direct violation of the statute.

The language of the Court in *Armstrong v. Ins. Co.,* 95 Mich., 139, approved in *Gazzam v. Ins. Co.,* 155 N. C., 338, in reference to a standard policy of insurance, is very pertinent to the present controversy. The Court said: "In using the word 'void,' the Legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and when loss occurs, say to the insured, 'Your policy is void, because we inserted a clause in it contrary to the law of Michigan.' Such a result would be a reproach upon the Legislature and the law. The law, so construed, instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the Legislature had in view."

"The law would be false to itself if it allowed a contract to be enforced in the courts against the intent and express provisions of the law." *Cansler v. Penland,* 125 N. C., 580.

There is no requirement in the statute as to notice, and no point seems to have been made in reference thereto on the trial, but it appears that the city of Hickory, the obligee in the bond, knew of all labor done and materials furnished, and as to a part of the plaintiffs, at least, itemized monthly statements were furnished the city, when the city manager gave assurance there was sufficient money due the contractor to pay all the claims, and that the surety company was promptly notified of these claims as required by the bond.

The contract of the defendant is to pay the materialmen and laborers and it must be held to its obligation.

The assignments of error do not conform to our rules, except the one to the refusal to dismiss the action, but as this raises the principal questions discussed in the briefs, we have considered the whole record, and find

No error.

C. F. MORRISON v. R. B. HARTLEY.

(Filed 10 December, 1919.)

1. **Evidence—Writings—Telegrams—Parol Evidence.**

Where a telegram, material to the inquiry, has been given to the defendant's brother, and defendant has failed to produce it upon notice, and there is evidence that the original has been lost and the records in the telegraph office destroyed, it is sufficient to admit of parol evidence of its contents.

2. **Evidence—Writings—Letters—Parol Evidence.**

Where the contents of a letter are not directly in issue and it is not the purpose of the action to enforce any obligation created by it, its contents may be shown by parol when relevant to the inquiry.

3. **Evidence—Contracts—Lands—Fraud—Damages—Nonsuit—Trials.**

In an action to recover damages for fraud in inducing a purchase of real estate at a fictitious price, a judgment as of nonsuit upon the evidence will not be granted when it tends to show a false representation as to the value of the land made with the knowledge that it was untrue, and with intent to deceive, and was relied on by the other party to his damage.

4. **Evidence—Contracts—Lands—Fraud—Measure of Damages.**

Where the defendant has induced the plaintiff by fraud to purchase land at an excessive price, the measure of damages is the difference between the real value of the lands and its value as fraudulently represented to be.

5. **Limitation of Actions—Contracts—Fraud—Discovery—Statutes.**

Where an action for damages will lie for fraud in inducing the purchasing of land at an excessive price, the three-year statute of limitations is applicable and will begin to run from the time the fraud was discovered, or should have been discovered, under the rule of the prudent man.

APPEAL by defendant from *Long, J.*, at the July Term, 1919, of CATAWBA.

The plaintiff sues to recover damages for fraud in the sale of real estate (160 acres) in Oklahoma, basing the action on alleged false representations of defendant vendor, that it was worth $200 per acre, their purpose being investment and speculation.

In the summer of 1909, the plaintiff, the defendant, and W. L. Hartley, a brother of defendant, all residents of North Carolina, went to Oklahoma and purchased 160 acres of land near the town of Britton, for $16,000. In a few days after the purchase of this land, they declined an offer of $20,000 for it. They returned home, and in November, 1909, W. L. Hartley, who had other holdings in Oklahoma, removed from North Carolina, and became a resident of that State. In December, 1909, W. L. Hartley listed their said 160-acre tract with Charles Phelps, a real estate dealer, at the price of $25,000, and on 10 January, 1910, said broker secured a purchaser, in the person of H. C. Finley, at the price of $25,000. Morrison and R. B. Hartley, at the instance of Morrison, declined to make a deed, and Phelps sued the three joint owners for commissions. The defendants in that action prevailed, not on the ground that a sale had not been effected, but on the ground that the contract with Phelps was conditioned upon the defendants being able, through the plaintiff, to secure certain other lands at a given price, and that said condition had not been, or could not be, complied with.

In March, 1910, the Hartleys sold their two-thirds undivided interest in the land to Morrison, on the basis of $25,000 for the entire property. Land values in that section declined very materially, and, seven years after his purchase from the Hartleys, he claims to have discovered that in that transaction a fraud had been perpetrated upon him. He made the discovery through W. L. Hartley, who, it appears, gave the information on account of a serious disagreement with his brother, the defendant.

The evidence of the plaintiff tends to prove that the fraud was perpetrated in March, 1910; that the defendant and his brother, W. L. Hartley, were in Oklahoma the first of the month and discovered that there was a great shrinkage in land values, and that the land in which they were jointly interested with the plaintiff was not worth more than $20 or $40 an acre; that they conceived the plan of selling to the plaintiff, who was in North Carolina; that they telegraphed the plaintiff that W. L. Hartley was about to sell his interest to one Finley on the basis of $25,000 for the whole land, and that it was worth $200 per acre; that the defendant returned to North Carolina and repeated his representations to the plaintiff; that relying on these representations, which were false, the plaintiff bought, and that he did not discover the fraud until 1917, when W. L. Hartley, upon disagreement with his brother, the defendant, told him of it. Also, that the defendant and his brother tried to prevent the plaintiff from discovering the fraud.

The evidence of the defendant was in direct contradiction of that for the plaintiff.

The jury returned the following verdict:

"1. Did the defendant falsely and deceitfully represent to the plaintiff that the market value of the land mentioned in the complaint was worth greatly in excess of its actual market value, and that W. L. Hartley was about to sell his interest therein to an outside party, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff rely thereon, and was he thereby induced to purchase a further interest in said land to his injury? Answer: 'Yes.'

"3. What damage is plaintiff entitled to recover of the defendant? Answer: '$3,000.'

"4. Did plaintiff pay out moneys for interest and taxes for the use and benefit of the defendant, as alleged in the complaint? Answer: 'Yes.'

"5. If so, what is the amount of such interest and taxes? Answer: '$1,160.'

"6. Is the plaintiff's action barred by the statute of limitations, as alleged in the answer? Answer: 'No.'"

Judgment on the verdict in favor of the plaintiff, and the defendant appealed.

Councill & Yount and E. B. Cline for plaintiff.

W. C. Newland, Mark Squires, and W. A. Self for defendant.

ALLEN, J. There are twenty-three exceptions in the record, sixteen to the admission or exclusion of evidence, one to the refusal to nonsuit, two to instructions on the issue of damages, three to instructions on the issue of the statute of limitations, and one to the signing of the judgment.

None of these require extended discussion, because the real controversy was one of fact, and most of the exceptions were taken as matter of precaution during the progress of the trial.

Those principally relied on are to permitting the contents of a telegram, purporting to have been sent by the defendant to the plaintiff in 1910, from Oklahoma to induce the plaintiff to buy, to be proven by parol, another to allowing the plaintiff to introduce a copy of a letter written by the defendant to his brother in 1916, and to the refusal to enter judgment of nonsuit.

The telegram was material to the inquiry, and the loss of the original was shown. The plaintiff testified he received the telegram, and afterwards gave it to the defendant, who said he wanted it "about dates" in a controversy with his brother, and the defendant, upon notice, failed to produce it, and it was also shown that the record in the telegraph office had been destroyed.

This was sufficient foundation for admitting parol evidence.

The loss of the letter, a copy of which was introduced, was not established, but the letter was not directly in issue, and it was not the purpose of the action to enforce any obligation created by it, and, "The rule excluding parol evidence as to the contents of a written instrument applies only in actions between parties to the writing, when the enforcement of any obligation created by it is substantially the cause of action." *Holloman v. R. R.*, 172 N. C., 375. See, also, *Faulcon v. Johnson*, 102 N. C., 268; *Carrington v. Allen*, 87 N. C., 354; *Ledford v. Emerson*, 138 N. C., 502.

The motion to nonsuit could not have been allowed, because evidence was introduced tending to prove a false representation as to the value of the land, made with the knowledge that it was untrue and with intent to deceive, relied on by the plaintiff to his damage, and it was for the jury and not for us to say whether it was worthy of belief.

His Honor instructed the jury that the measure of damages was the difference between the real value of the land and its value as it was represented to be, and that the action was barred if more than three years elapsed before the bringing of the action after the discovery of the fraud by the plaintiff, acting as a prudent man, which is in accord with our precedents.

The verdict might well have been in favor of the defendant, as the plaintiff had to rely on the evidence of W. L. Hartley, who admitted that he conspired with the defendant, his brother, to defraud the plaintiff, and who made no disclosure until he and his brother disagreed, but these were matters for the consideration of the jury, and on the exceptions there is no error which authorizes us to order a new trial.

No error.

SAM ANGEL v. CAROLINA SPRUCE COMPANY.

(Filed 10 December, 1919.)

1. **Employer and Employee—Master and Servant—Negligence—Evidence—Trials.**

   Evidence tending to show that the plaintiff, having had long experience and skill in the particular work, was left to his own methods in cutting out timber from lands, and had cut the branches from a felled tree for its more convenient placing when it rolled upon his foot, causing the injury complained of, is insufficient upon the question of the defendant's actionable negligence; nor will this principle be affected by reason of an order of his superior employee to roll this particular tree down a hill for convenient removal when it does not appear that the hazard was thereby increased or that any serious injury was likely to result therefrom. *Rumbley v. R. R.*, 153 N. C., 457, cited, approved and applied.

2. **Employer and Employee—Master and Servant—Principal and Agent—Physicians and Surgeons—Negligence—Damages—Questions for Jury—Evidence—Trials.**

   Evidence tending to show that a corporation, with previous knowledge of the incompetency or unskillfulness of a physician selected by it to attend and treat the plaintiff for an injury received in its employ, and that the plaintiff and other employees paid the defendant, under a certain plan, certain fees or amounts of money for the purpose of paying the physician's salary is sufficient for the consideration of the jury as to the recovery of damages to plaintiff caused by the lack of proper skill of the physician it had thus selected.

3. **Evidence—Nonsuit—Motions—Trials.**

On a judgment of nonsuit against the plaintiff, the evidence which makes in his favor must be taken as true and construed in the light most favorable to him.

APPEAL from *Webb, J.*, and a jury, at August Special Term, 1919, of YANCEY.

The complaint sets forth two causes of action:

First. That while plaintiff, an employee of the company, was engaged as wood chopper in getting out timber from the company's land, a tree, which plaintiff and another had felled in the course of his work, rolled on plaintiff's foot, mashing it severely and ultimately causing the loss of several toes. The negligence imputed being a failure to provide plaintiff with a safe place to work, and negligent directions given by one W. E. Wiseman, plaintiff's boss, and who stood towards plaintiff in relation of vice principal.

The second cause of action being for injuries and pain and suffering, due to treatment of plaintiff's hurt, or lack of it, by an unattentive and unskillful physician employed by the company to treat its injured employees, retained by the company with full knowledge of his limitations and methods. At the close of the testimony, on motion, there was judgment of nonsuit as to both causes of action, and plaintiff excepted and appealed.

R. Wilson and G. E. Gardner for plaintiff.
Charles Hutchins and A. Hall Johnston for defendant.

HOKE, J., after stating the case: On the first cause of action there were facts in evidence on the part of the plaintiff tending to show that in the latter part of 1916 and the first part of 1917 plaintiff and one Willard Gregory, an employee of defendant, were engaged in getting out timber from the company's land in said county, and in the course of their employment had cut down a tree that fell so as to make it inconvenient for sawing the same into logs. That with a view of giving the tree a better placing, they proceeded to cut off the branches and top of the tree, and as they cut the latter the body of the tree rolled down on plaintiff's foot, severely injuring it, so that from the hurt, or the negligent treatment of the company's physician, who attended plaintiff, or from both, three of his toes, the great toe and two next to it, had to be amputated. It further appeared that plaintiff had long been engaged in work of this kind; that the particular job was well within his experience and training, and he was left largely to his own methods of doing it. Upon these facts, chiefly pertinent to the inquiry, we see nothing that tends to establish culpable negligence on the part of the company. In

Rumbley v. R. R., 153 N. C., 457, plaintiff and another carpenter had been sent by defendant to take down an old shed on the company's right of way. While standing on one of the joists knocking loose the rafters overhead they gave way, knocking the plaintiff to the ground and causing the injuries complained of. On these facts a judgment of nonsuit was sustained, and the Court, in delivering the opinion said: "The work that the plaintiff was given to do was simple in operation, and well within his experience and training, and he was left to select his own method of doing it. On the facts presented there has been no breach of legal duty established, and the judgment of nonsuit has been properly allowed."

Numerous decisions of the Court on the subject are in approval of the principle, and fully support the judgment of nonsuit on plaintiff's first cause of action. *Simpson v. R. R.*, 154 N. C., 51; *Bunn v. R. R.*, 169 N. C., 648; *Winbourne v. Cooperage Co.*, at present term, and other like cases. Nor is position affected by the testimony of plaintiff that Wiseman, who was the boss in general supervision of the plaintiff, gave directions that this tree, when cut, should be thrown down the hill. Wiseman does not seem to have been present at the precise time of the cutting, but whether he was or was not, the order was given only with a view of having the logs, when cut, nearer the road, and thus more convenient for removal, and it does not appear that there was any increased hazard in so throwing the tree, nor that injury of any serious kind was at all likely to result from the order. *Winbourne v. Cooperage Co., supra*, and the authorities cited.

On the second cause of action there are facts in evidence which tend to show that plaintiff, an employee of defendant, or on their payroll and engaged in work for their benefit, having received injuries as above stated, was treated by a physician employed or provided by the company to attend to employees doing their work, and that under the arrangement, plaintiff, at the time of the injury, was duly assessed by the company for paying the doctor. That he was unskillful, incompetent, and careless, and that this was well known to the company and its managing officers, and that by reason of this physician's lack of proper care and the bungling methods in the treatment he afforded, plaintiff's sufferings were greatly aggravated and prolonged, the injured toes became gangrenous and had to be amputated, and even more serious results were threatened. It is uniformly held by us that on a judgment of nonsuit against the plaintiff, the evidence which makes in favor of plaintiff's claim must be taken as true and construed in the light most favorable to him, and applying the rule, and under our decisions, applicable to the facts so considered, the inference of an actionable wrong on the part of the company is clearly presented, and plaintiff is entitled to have his cause submitted to the jury. *Woody v. Spruce Co.,* at the present term, and authorities cited; *same case,* 176 N. C., 643, and *same case,* 175 N. C., 545. We are not inadvertent to the position insisted on by defendant that the facts in evidence tend to show that Wiseman was doing this work as an independent contractor, and that the relationship of employer and employee did not exist between plaintiff and defendant. There is evidence which may be so interpreted, but there is also testimony permitting the construction that Wiseman was himself but an employee of the company at this time under the principles approved in *Beal v. Fibre Co.,* 154 N. C., 147, and other like cases, and, furthermore, whether Wiseman was one or the other, that at the precise time of the injury plaintiff was on the company's payroll, and being assessed for the salary of the physician who had been secured by the company for the purpose of treating their hands, and of whose neglect plaintiff now complains. As to what bearing this evidence may have on the ultimate rights of these parties we consider it best not to make definite decision until the facts shall be more fully and clearly established.

For the reasons indicated the judgment of nonsuit as to plaintiff's first cause of action is affirmed, and on the second cause of action the judgment will be set aside, and the cause proceeded with in accordance with law and course and the practice of this Court.

Error.

MARY CARY v. TEMPE HARRIS.

(Filed 10 December, 1919.)

1. **Contracts— Breach— Loss— Profits Prevented— Damages— Certainty of Admeasurement—Lessor and Lessee.**

   Upon a breach of lessor's contract that he will maintain the water supply at a summer resort in the same condition as it was in at the time of the rental, and that his failure to have done so caused the guests to leave, the rule of the admeasurement of damages is that the injured party may recover all the damages, including gains prevented as well as loss sustained, as were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty.

2. **Contracts—Lessor and Lessee—Water Supply—Resorts—Leaving of Guests—Contemplation of Parties.**

   The leaving of the guests at a summer resort for failure of the lessor to keep the water supply in proper condition, resulting in the inability of the guests to take baths and their apprehension from the insanitary conditions of toilets, sewers, etc., is a result reasonably within the contemplation of the lessor and lessee at the time of the making of the lease, entitling the lessee to such damages resulting from the lessor's breach as he may show with a reasonable degree of certainty.

3. Contracts—Breach—Lessor and Lessee—Resorts—Guests Leaving—Water Supply—Damages—Certainty of Admeasurement—Evidence—Questions for Jury—Trials.

Where the lessor of a summer resort has breached his contract to maintain an ample water supply for the leased premises, causing thereby all the guests to leave, evidence is sufficiently certain on the question of the admeasurement of damages which tends to show that during former seasons and to the time of the breach the rooms and dining tables were practically fully occupied, from which a certain profit was realized, and that extra servants were necessary to carry water under the changed conditions, causing an extra expenditure of money, such evidence being the most intelligible that the nature of the case will permit.

CIVIL ACTION, tried before *Ray, J.*, at March Term, 1919, of BUNCOMBE, upon these issues:

"1. Is the defendant, Tempe Harris, indebted to the plaintiff on account of rents, as alleged in the complaint? And if so, in what amount? Answer: 'Yes; $776.84, with interest on $478.50 from September 1, 1917, and interest on $298.34 from October 1, 1917.'

"2. Did the plaintiff neglect and fail to comply with the terms of the lease mentioned in the complaint, as alleged in the answer, and if so, was the defendant damaged thereby? Answer: 'No.'

"3. If so, what damage did the defendant, Tempe Harris, sustain by reason of such failure? Answer: 'Nothing.'"

There is no controversy in regard to the finding of the jury upon the first issue. The court directed the jury to answer the second "No," and the third issue "Nothing." The defendant excepted, and from the judgment rendered appealed.

Mark W. Brown for plaintiff.
Martin, Rollins & Wright for defendant.

BROWN, J. The plaintiff seeks to recover for rents for the Mountain Meadows Inn, a summer resort hotel near Asheville, for the season of 1917. These rents were calculated upon the amount of the gross receipts under the terms of the written contract of lease and are not in dispute. The defendant set up a counterclaim for $5,000 for breach of the contract of lease, claiming that she had been damaged by reason of the loss of profits and loss of business and extra expense caused during the season of 1917, on account of the failure of the plaintiff to comply with the contract of lease and supply the hotel property during the summer of 1917 sufficient water for the use of the guests in the hotel. That the water supply, by reason of the neglect of the plaintiff, failed, and the guests left the hotel in consequence, the business was broken up, and the defendant sustained loss amounting to several thousand dollars.

At the conclusion of all the evidence, the Court, being of opinion that the defendant was not entitled to recover substantial damages, directed the jury to answer the second and third issues as above set out. The only point before us is the correctness of such ruling. The learned judge evidently was of opinion that the damages sustained by the defendant could not be ascertained with sufficient accuracy to warrant the submission of the issue to the jury. The plaintiff claims the property under her father, who leased it to the defendant. In the written lease, the lessor contracted to make all necessary outside repairs. The defendant testified that she had leased the premises for five years in 1911, and had renewed the lease in 1916 for five years more; that the hotel was kept open from 15 April to 1 November, and consisted of one main building, two cottages, a garden, etc.; that the main building contained nineteen bedrooms, had seventeen baths, and that there were in all twenty-one toilets, forty-one bedrooms, including main building and cottages, and eight private baths; that she had complied with the terms of the lease; that when she rented the hotel in 1916 it was supplied with water and contained a sewerage system; that the water for the bathrooms and other purposes was received from mountain springs and piped into a reservoir, and that there was a large roof on top of the reservoir, built for the purpose of catching rain water and draining into the reservoir, because the springs were not ample to supply the property with water; the roof over the reservoir was there when the lease was made; that the water supply was the same in 1911, 1912, 1913, and 1916; that in the fall of 1916 a windstorm blew the shed or roof off the reservoir; that this roof had been built flat, inclined towards the center from all sides, with an opening in the center, and all the rain water that fell on the roof fell into the reservoir; that it blew off in October, 1916; that witness notified plaintiff's husband, who was her agent; that he came to Asheville in November; before coming he wrote for defendant, if it wasn't necessary to have it attended to at once, to wait until he came to Asheville; that when he came to Asheville defendant told him the roof was necessary because she didn't have enough water from the springs or the springs would not supply the hotel; Mr. Carey then said he wasn't going to have the roof replaced; defendant told him it was necessary, and that if he didn't have it put back that they would have trouble; the roof was not put back so as to catch the water for the season of 1917; it was put back only so as to catch a portion of the water, and it did not drain into the reservoir; that prior to this time the reservoir and springs had furnished a reasonably good supply of water for the hotel; that the water gave out on 5 August, 1917, and there wasn't any water to supply the bathrooms and toilets; all the bathrooms had to be cut off; toilets had to be flushed with water carried to them from springs on the mountainside; water had to be carried to all the rooms of the guests; that after the water gave out Mr. Carey had a small pump put in, but that did not remedy the difficulty; that she used the water as carefully as possible; that there was an additional small reservoir intended to be used at Hillside Cottage, one of the cottages under the lease; that the water from the small reservoir gave out on 8 August; that at the time the water gave out every room in the place was engaged; there were between 65 and 70 people in the house, with only two vacant rooms, and people were coming in all the time; that it took 14 to 20 servants, and defendant had that number; that when the water gave out the condition was very objectionable; it was unsanitary; the baths and toilets were cut off entirely; no one in the house had a bath; the water for cooking was carried from the springs; that she didn't have enough water to cook with or wash dishes; at that time the guests were paying $15 a week with one in a room, and from $25 to $50 a week for two in a room; when the water gave out the guests were dissatisfied; many left; that they complained for lack of water; said they couldn't put up with the inconvenience of not having baths, and were afraid of serious sickness on account of sanitary conditions; that they stood the conditions as long as they could put up with them; that Mr. Carey came to the hotel on 8 August and promised water; he saw the number of people that were in the house; saw the house was full of people, and promised water; the water supply was improved very little; that some of the guests had engaged rooms for the entire season; that she had at one time between seventy and seventy-five people in the house, and they were reduced on account of the lack of water to ten or twelve people; the condition as to the water continued through the season until the guests had all gone. Witness then gave the names of a large number of guests who left on account of the lack of water.

Witness further testified that the place would have accommodated eighty to eighty-five people, and that August was the best month of the year at Mountain Meadows Inn. That the actual receipts for 17 August were $2,990.69; for September, $1,864.64; for October, $502.71; that according to her estimate the income for the property during August, 1917, but for the scarcity of water would have been $5,538.15, and for September the income would have been between $3,000 and $4,000, and for October between $1,000 and $2,000; that her loss during the summer of 1917 on account of the scarcity of water was between $5,000 and $6,000; that hotel rates had increased 50 per cent over what they were in 1914.

Witness further testified that she paid seventy-odd dollars for extra help for carrying water, and that she suffered some losses on account of the condition of the roads and want of a telephone line to the hotel; that the roof over the reservoir was 52 by 78 feet prior to October, 1916, and that she did not know until the summer of 1917 that the roof had not been put back as it was before; that she knew there would not be enough water without the use of rain water, but she did not know that Carey had not arranged to catch all the rain water; that Mr. Carey had the work done in February, and was to make the outside repairs.

Witness further testified that in her opinion the value of the lease for the year 1917, if water had been furnished, would have been at least six thousand dollars, and that as it was she made no money at all, but actually lost money.

There was evidence tending to prove the rainfall during the season of 1917, and that if the shed, 52 feet by 78 feet, had been constructed as it formerly was so as to let the water falling on it into the reservoir, an ample supply of water for the season would have been furnished. There was also evidence that Carey instructed Reed to fix the roof over the reservoir in the cheapest way possible, and to so construct it that the water would pour off on the outside and not go into the reservoir. This was in February, 1917. There was evidence corroborating the defendant that she told Carey in November, 1916, that the rain water was necessary. There was evidence that the reservoir was full when the hotel opened for the season of 1917, and that the water gave out entirely by 5 August. There was evidence that there was an abundance of rain during the season of 1917; there was also much other testimony to the effect that a large number of guests left the hotel in August, 1917, for lack of water, and many other persons refused to take rooms at the hotel because they had no water for baths and toilets.

We differ with his Honor in the conclusion that substantial damages may not be recovered by the defendant if the evidence is to be believed. The rule is, in the admeasurement of damages in a case of this kind, that the party injured may recover all the damages, including gains prevented as well as losses sustained, as were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty. *Nance v. Tel. Co.*, 177 N. C., 313; *Gardner v. Tel. Co.*, 171 N. C., 405; *Hardware Co. v. Buggy Co.*, 167 N. C., 423; *Wilkerson v. Dunbar*, 149 N. C., 20.

In the *Nance case, Mr. Justice Walker* says: "In an action for damages the plaintiff must prove as part of his case both the amount and cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered though plaintiff can only give his loss approximately." Hale on Damages, sec. 70; Sutherland on Damages, sec. 70.

The *Nance case* is very much in line with the present case. In Sutherland on Damages, 4th Ed., secs. 867 to 870, will be found a full discussion of the subject now under consideration.

In section 868, a case from New York is discussed, wherein the plaintiff was the lessee of a hotel and showed actual receipts of the property for previous years, and daily receipts for some months, and that there was a breach of contract. The following language is quoted with approval: "When it is borne in mind that the plaintiff kept a refectory and boarding-house for the resort of daily visitors for their various meals, and of transit persons for their lodging, it is difficult to suggest any other mode of ascertaining the effect upon the plaintiff's business. To say that he must prove what persons were prevented from visiting his house and what meals they would have taken and paid for is to suggest a mode of proof obviously impracticable, and if it was done it would still leave the same inquiry, 'What would have been the profit of the meals they took and paid for?' "

Plaintiff was allowed to recover upon a similar contract in the case of *Union Pacific R. R. Co. v. Travelers' Insurance Co.,* 83 Fed., 676.

In *Wilkinson v. Dunbar, supra,* it is said by *Mr. Justice Hoke:* "When prospective damages are allowed to the injured party as arising under a breach of contract, they must be such as are in reasonable contemplation of the parties and capable of being ascertained with a reasonable degree of certainty; and while profits prevented are frequently held to be excluded, they are those expected by reason of collateral engagements, or dependent to a great extent on the uncertainty of a trade and fluctuations of the market."

It follows from all these authorities that the profits lost by the lessee of a hotel, whether those which were the immediate fruits of the business or those which were remote, if the contract was made with reference to them, are recoverable if they can be ascertained with reasonable certainty. That the profits to be made out of a lease of a hotel in conducting the business thereof are within the contemplation of the parties to the lease is a proposition too plain for discussion. An injury to the hotel business consists mainly of a loss of profits, and, therefore, it has been held that where a lessee conducts the business himself, it is competent for him to testify, as the defendant did in this case, to the value of the business based upon the capacity of the hotel, the average number of guests, the rates charged, and the average daily profits. *Allison v. Chandler,* 11 Mich., 542. The law does not require impossibilities, and therefore does not require a higher degree of certainty than the nature of the case admits.

As said by Mr. Sutherland, sec. 870: "Juries are allowed to act upon probable and inferential as well as direct and positive proofs, and when from the nature of the case the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

As Mr. Sutherland again says, sec. 70: "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of. . . . There is no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of a cause."

If the evidence of the defendant is to be believed, there was a breach of the contract of lease upon the part of the plaintiff, and according to her testimony the jury would have been warranted in answering the second issue "Yes." The testimony of the defendant also furnished reasonable data from which the jury could have approximated the damages she sustained by reason of such breach during the season of 1917, with reasonable certainty.

New trial.

MRS. SUSANNA WILLIAMS v. C. G. BAILEY, B. R. BAILEY ET AL., EXECUTORS OF W. R. BAILEY.

(Filed 3 December, 1919.)

1. **Deeds and Conveyances—Descriptions—Reference to Other Instruments—Wills.**

   Where a deed or instrument conveying land refers to another for description, the principal deed should be considered and construed as if the description referred to was written out therein in full.

2. **Deeds and Conveyances—Wills—Ambiguous Descriptions—Definite Descriptions.**

   An unambiguous and certain description of land in a deed will control one therein which is indefinite and uncertain.

3. **Same.**

   A testator devised his "Bat Allen place" to his sister, giving the number of acres, and referred to a deed from said Allen giving description by known and visible lines and boundaries, containing the number of acres specified, and excepted therefrom "that portion heretofore sold to John Allen." It was admitted or clearly established that the land thus excepted was from an adjoining tract of land acquired by the testator from Bat Allen, and sometimes known as the Tomlinson tract: *Held*, the land intended to be devised by the testator is that included in the boundaries of the deed referred to and not otherwise, and evidence tending to show that both of these tracts were included in the "Bat Allen place" was properly excluded.

CIVIL ACTION to restrain a sale of certain real estate by executors of W. A. Bailey, heard before *Harding, J.*, and a jury, at February Term, 1919, of DAVIE.

At the close of the testimony, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Jacob Stewart and Holton & Holton for plaintiff.
E. L. Gaither and A. T. Grant, Jr., for defendants.

HOKE, J. On the hearing it appeared that C. G. Bailey and others, executors of the last will and testament of W. A. Bailey, deceased, intended presently to make sale of a tract of land in said county, containing 63 acres, more or less, under clause in the will authorizing them to sell any and all lands of the testator not specifically devised by him. That plaintiff instituted this action to enjoin said sale, claiming the land as specific devisee under the following clause in the will:

"I give, devise, and bequeath to my beloved sister, Susanna Williams, and her heirs forever, the following tract of land, to wit: A tract containing two hundred and forty-two acres (242), more or less, known as the 'Bat Allen' place, for a full description of which reference is hereby to deed from H. B. Allen et al. to W. A. Bailey, dated March 26, 1898, recorded in Book ......, p. ......, register's office of Davie County, N. C. Save and except that portion thereof heretofore sold to Jno. Allen, by deed dated .... day of ...., to her, the said Susanna Williams, and her heirs in fee simple forever."

In reference to this clause in the will, it was admitted or clearly established that the 242-acre tract referred to as contained in the deed of H. B. Allen to the testator and definitely described by known and visible lines and boundaries, did not include the land in controversy, but the same was a part of a 97-acre tract adjoining the former, and which had been acquired from one Tomlinson, and sometimes designated as the Tomlinson tract; also owned by Bat Allen. That while the latter owned the two tracts, he personally resided on this 242-acre tract, and the other was occupied as tenant by his son, Ben Allen. That the testator, after he acquired the two tracts of land, sold about 33 acres off the Tomlinson tract to John Allen, leaving 64 acres of that tract, being the land in dispute.

In well considered decisions on the subject it is held, with us, that where a deed or instrument conveying lands refers to another for description, the principal deed should be considered and construed as if the description was written out therein in full. *Gudger v. White,* 141 N. C., 507; *Enliss v. McAdams,* 108 N. C., 507. And further, it is the recognized position in construing such instruments that where there is an "unambiguous and certain description," and also one that is indefinite and uncertain, the former is to be regarded as controlling, and the latter will be rejected. *Peebles v. Graham,* 128 N. C., 218; *McDaniel v. King.* 90 N. C., 602; *Jones v. Robinson,* 78 N. C., 397. Applying these accepted rules of construction, and setting out the description as it appears in the H. B. Allen deed, expressly referred to, the devise in question would read as follows:

"I devise to my beloved sister, Susanna Williams, a tract of land containing 242 acres, known as the 'Bat Allen' place, fully described in a deed from H. B. Allen and others to W. H. Bailey, dated March 26, 1898, duly recorded in register's office of Davie County, said land being located and described as follows: 'Beginning at a large stone, running north 30′ variation, 25 chains and 19 links to a post oak; thence west 21 chains to a dogwood; thence north 20 chains and 45 links to a blackjack and rock in Tomlinson's line; thence with his line north 22.09 chains to a stone; thence east 5.82 chains to a maple; thence north 4.95 links to a dogwood; thence east 17.52 chains to a dogwood; thence south 7 chains to a hickory; thence east 18.82 chains to a stone; thence south Haneline's line 80.09 chains to a stone; thence west to the beginning, containing 242 acres, more or less." Except that portion thereof heretofore sold to John Allen.

Under such a description the devise in question affords a clear and definite indication that the land intended by the testator is that included in the boundaries of the deed referred to and not otherwise, and we must approve the decision of his Honor in excluding evidence offered by the plaintiff, tending to show that both the 242-acre and 97-acre tracts were understood to be included in the "Bat Allen place," and were so referred to and considered by the testator in his lifetime.

In *McDaniel v. King, supra,* there was a devise in the testator's "home plantation" setting forth a description by clear and definite lines and boundaries, and it was held that the land included in the boundaries would pass, and evidence tending to show that the testator considered his home plantation was properly excluded.

Speaking to the question in the opinion, *Judge Merrimon* said: "If the testator had simply excepted his 'home plantation,' then a question might have been raised as to what lands composed it, and his meaning in respect thereto.

"There is no ambiguity; nothing is left in doubt. The testator had the right to declare what should constitute his 'home plantation'; he did so by fixing a definite boundary to it—one that leaves no doubt as to what he meant, looking at the plain legal import of the terms he employed to express his purpose in the will. It is so certain there is nothing to be explained or qualified."

Nor is the position in any way affected by the exception appearing in the devise of the portion of the land sold to John Allen. It only indicates that the testator was mistaken as to the tract so sold by him. Probably being uncertain as to whether the sale was from the one tract or the other, the exception was inserted by way of assurance that he did not wish to appear in the attitude of devising land he might have sold off, but in no event could it be allowed to enlarge or ignore the definite description by metes and bounds, which he had seen proper to use in his will. *Peebles v. Graham,* 128 N. C., 222; *Scull v. Pruden,* 92 N. C., 168-173; *Proctor v. Poole,* 15 N. C., 371. In *Scull v. Pruden* it was said:

"When the subject-matter of conveyance is completely identified, by its location and other marks of description, the addition of another particular, which does not apply to it, will be rejected as having been inserted through misapprehension or inadvertence."

We are referred by counsel to *Quelch v. Futch,* 172 N. C., 316, as an authority in contravention of his Honor's ruling in excluding the evidence offered by the plaintiff, but we do not so interpret the decision. In that case the principal deed contained two descriptions by metes and bounds, one written out and the other by reference to another deed of definite description and containing a larger boundary. The latter deed including the land in controversy, while the former did not; there being clear indication on the face of the deed that the larger boundary was intended to pass.

"Words descriptive of lands sought to be conveyed in a deed are regarded as inserted for a purpose, and should be given a meaning that would aid the description; and where the writing manifests an intent to convey a tract of certain acreage, and the specific description in the conveying part of the instrument is too indefinite, it will not control a general description, following the *habendum,* which refers to another and recorded deed, from which the lands may definitely be ascertained."

Expressing the basic principle of the decision, the Court said: "A reference to another deed may control a particular description, for the deed referred to for purposes of description becomes a part of the deed that calls for it. 13 Cyc., 362; *Brown v. Ricaud,* 107 N. C., 639; *Everett v. Thomas,* 23 N. C., 252." But in the instant case there are no opposing data having any definite significance, and nothing to justify a departure from the clear and precise description appearing in the deed to which the testator has chosen to refer.

There is no error, and the judgment of the lower court is

Affirmed.

A. F. JOYNER, ADMINISTRATOR, v. CHAMPION FIBER COMPANY ET AL.

(Filed 10 December, 1919.)

1. **Pleadings—New Parties—Supplementary Complaint—"Since Last Continuance"—Court's Discretion—Statutes.**

An employee sued a corporation to recover damages for an alleged negligent injury, and after pleadings filed it was announced in open court that a judgment had been agreed upon, apportioning the amount between the defendant and his indemnifying surety, not a party, but the surety objected to the amount apportioned therein to him on the eve of adjournment, and at the next term the court permitted the plaintiff to file a supplemental complaint, setting forth the agreement, in the nature of "a plea since last continuance," and ordering that the surety be made a party to the action: *Held*, the duty of the court to order all parties affected to be brought in (Revisal, 414), which is not appealable; and that the amendment, with the course taken, was a proper one and did not constitute a new cause of action.

2. **Appeal and Error—Parties—Statutes.**

An appeal from an order of court making new parties is premature, the remedy of such being to have themselves exempt from paying cost in the final judgment in which the ultimate rights are to be determined. Rev., 563.

3. **Judgments—Consent—Attorney and Client—Questions for Jury—Trials—Evidence.**

Whether an attorney had been authorized to enter a compromise judgment by his client is ordinarily a question of fact for the jury to determine.

4. **Appeal and Error—Pleadings—Demurrer—Judgments.**

An appeal will presently lie from the overruling of a *bona fide* demurrer, and an entry of judgment by default for the want of an answer, pending the appeal, is erroneous.

APPEAL by plaintiff, and also by defendant, Fidelity & Casualty Company, from *Ray, J.*, at May Term, 1919, of BUNCOMBE.

The action was brought against the defendants, Southern Railway Company, Champion Fibre Company, and J. H. Blizzard, to recover damages for the negligent killing of plaintiff's intestate while in the employment of the Champion Fibre Company, and while attempting to uncouple cars owned by Southern Railway Company, causing his death. The railway company and fibre company filed answers. The cause was set for trial, and witnesses subpœnaed. In negotiations for a compromise at that term it appeared that the defendant Fidelity & Casualty Company was liable for any recovery that might be had against the fibre company, and had employed lawyers in the cause to represent the fibre company, one of the defendants of record, and in consequence of instructions to their attorneys from the said Fidelity & Casualty Company, who represented both the fibre company and the Fidelity & Casualty Company, a compromise was agreed to by counsel for all the parties that the plaintiff should recover judgment for $3,750, to be apportioned against the parties as follows: Champion Fibre Company, $250; Southern Railway Company, $500; Fidelity & Casualty Company, $3,000.

Said agreement was announced in open court, and the witnesses were discharged. After they had left the jurisdiction of the court, and on the eve of adjournment, plaintiff was notified that the Fidelity & Casualty Company made objection to the apportionment of the judgment, claiming that the railway company should pay a larger proportion and the fibre company a smaller part of the $3,750. The compromise was announced in open court at June Term, 1918. At December Term, 1918, the plaintiff filed a supplementary complaint in the nature of a "plea since last continuance," setting forth the said agreement, and the court adjudged that the Fidelity & Casualty Company was a necessary and proper party, and directed that a summons issue for said company as a party defendant, which was duly served upon the State Insurance Commissioner, as required by law, 3 January, 1919.

At May Term, 1919, the defendant Fidelity & Casualty Company entered a special appearance, and moved to be dismissed, which motion was denied. It then filed a demurrer involving the same question which was overruled, and it appealed. The Southern Railway Company and the fibre company filed answer admitting the allegations in the amended complaint. No answer having been filed by the Fidelity & Casualty Company, the plaintiff moved for judgment in accordance with the terms of the compromise set out in the verified amended complaint filed with the plaintiff, which the court refused, and the plaintiff appealed.

Wells & Swain for plaintiffs.
Merrimon, Adams & Johnston for Fidelity & Casualty Company.

CLARK, C. J. The court had the right, and in fact it was its duty, to require all the parties to be brought in whose rights would be affected by the proceeding. Rev., 414. The trial judge found as a fact that said company was a proper and necessary party after the alleged compromise, and his action was not reviewable. *Aiken v. Mfg. Co.*, 141 N. C., 339. The judgment "may determine the ultimate rights of the parties on each side between themselves." Rev., 563.

An order making additional parties is not appealable. *Bennett v. Shelton,* 117 N. C., 103; *Emory v. Parker,* 111 N. C., 261; *Lane v. Richardson,* 101 N. C., 181; and would have been premature, *Etchison v. McGuire,* 147 N. C., 389; *Bernard v. Shemwell,* 139 N. C., 447; *Tillery v. Candler,* 118 N. C., 889. In fact, there was no appeal or exception to the order.

Should an order making an additional party prove unnecessary the remedy is on the final judgment to allow such additional party to recover his costs. *Walker v. Miller,* 139 N. C., 448; *Jarrett v. Gibbs,* 107 N. C., 304; *Henderson v. Graham,* 84 N. C., 496.

The proceeding by plea since last continuance, filing a supplemental complaint, became proper and, indeed, necessary to the final disposition of the action. If the Fidelity & Casualty Company were, as alleged, responsible for any recovery against the fibre company, it may be that it was a proper party in the first instance, but it was not a necessary party till the compromise announced in open court. *Gorrell v. Water Co.,* 124 N. C., 328, and cases cited thereto in the Anno. Ed.

The trial judge correctly held that the amended complaint was in effect a plea since the last continuance, and that the whole matter should properly be disposed of in this proceeding. The courts do not favor a multiplicity of actions. The amended complaint does not set forth a different and a new cause of action, but seeks to subject the Fidelity & Casualty Company on the alleged compromise by its duly accredited agent of its ultimate liability in this case, to which it has been made a party.

It was not necessary to institute a new action, but the whole matter should be properly and expeditiously settled in this proceeding by issuing a summons to make said company an additional party defendant, as was done. If it is found that it did consent, through its duly accredited agent, to said compromise, judgment should be entered accordingly.

If it did not authorize such compromise its liability would depend upon the right of the plaintiff to recover, as beneficiary of the contract. Whether such compromise was authorized or not is a matter to be adjudged by a jury upon answer filed, and the plaintiff would have been entitled to judgment by default in not filing an answer, but for the fact that the Fidelity & Casualty Company filed a demurrer.

Upon overruling the demurrer the said Fidelity & Casualty Company was entitled to appeal, unless the demurrer had been held frivolous. Rev., 506. The demurrer was proper overruled, but it was not frivolous, and the plaintiff was therefore not entitled to judgment pending the appeal from overruling the demurrer.

The judgment on both appeals is sustained. Each party will pay its own costs of the appeal. Judgment on both appeals

Affirmed.

RACHEL E. WHITE, ADMX., v. A. J. SCOTT.

(Filed 10 December, 1919.)

Limitation of Actions—Cause Accrued—Mental Incapacity—Trusts—Evidence.

The statute of limitations on a note begins to run from the time the cause of action thereon accrues, Rev., 169, and when it has once commenced, it is not suspended because of the payee's mental incapacity thereafter; and in this case it is *Held*, that there was no evidence of a trust relation between the parties that would affect the operation of the statute, or require a demand for payment by the payee's administrator.

CIVIL ACTION, tried before *Harding, J.*, at April Term, 1919, of CABARRUS.

Plaintiff alleged that defendant had executed to her intestate, Mary J. Scott, three notes, one for $250, on 14 March, 1896; one for $50, on 3 April, 1897; and the remaining one for $320, on 9 July, 1896, all of them due one day after date, with interest from date. On the first note the last payment was made on 13 March, 1899; on the second on 3 April, 1899, and on the third on 9 July, 1898, and there were no later payments of any kind. Mrs. Scott died on 19 June, 1916. This action was commenced on 9 June, 1917. The payments were entered as credits on the notes.

The defendant admitted the due execution of the notes; denied the date of payment on the third note; alleged that a large part of the notes was intended as a gift from his mother, to whom the notes were payable, and pleaded the statute of limitation of ten years.

The plaintiff replied as to the statute that Mrs. Scott was *non compos mentis* for some time after an illness, though there was evidence that she had lucid intervals and her mental aberration was not continuous. The plaintiff's witness, W. L. Winecoff, testified:

"I had known Mary J. Scott a long number of years. I did not know of her selling real estate until what she said. She told me she had. This was about 1900, I reckon. I do not mind whether it was 1900 or 1905. She told me she had sold her property to her son John. She did not tell me what she got for it. I did not ask her." Q. "Did she talk like she had any sense then?" A. "That was before she had that spell of sickness. I never saw anything wrong with her mind prior to the time she had that spell of sickness. She was an unusually intelligent woman. She attended church regularly." Q. "In your opinion she was one of the most intelligent ladies in that community?" A. "She was very intelligent. I do not remember whether or not she told me about the fact that she had been on a trade with her daughters and bought some of them out. I believe she told me she had bought Mr. Will Stewart's part. I don't believe she told me about buying three-elevenths, and that she sold the whole thing to John Scott after that. She was down sick two or three weeks with pneumonia and she got over it. After she got up she was all right at times. I discovered that her mind was not all right directly after she had pneumonia; at times I saw it was not all right." Q. "But the bigger part of the time her mind was all right after she got up from pneumonia?" A. "She appeared like it part of the time and part of the time I don't think she was."

The plaintiff also alleged that the defendant was agent of his mother during the time of the transaction in regard to the notes.

The court granted a motion of the defendant to nonsuit the plaintiff, and judgment was entered accordingly. Plaintiff appealed.

J. E. Crowell and H. S. Williams for plaintiff.
Maness & Armfield and L. T. Hartsell for defendant.

WALKER, J., after stating the relevant facts as above: The defendant executed the three notes to the plaintiff as far back as the years 1896 and 1897, so that they are barred by the statute of limitations, unless the plaintiff's intestate was insane at the time the cause of action upon the notes accrued, for that is the language of the statute, as will appear by this reproduction of it: "No person shall avail himself of a disability, unless it existed when his right of action accrued." Code of 1883, sec. 169; Revisal of 1905, sec. 169. According to the evidence in this case, Mrs. Scott's illness occurred in the year 1909, and, as it was subsequent to the accrual of the cause of action, it did not interrupt the operation of the statute, if the full time had not elapsed before her illness commenced. *Eller v. Church,* 121 N. C., 269; *Asbury v. Fair,* 111 N. C., 251. It is familiar learning that when the statute once begins to run no disability will stop it. *Kennedy v. Cromwell,* 108 N. C., 1; *Ervin v. Brooks,* 111 N. C., 358; *Causey v. Snow,* 122 N. C., 326; *Self v. Shugart,* 135 N. C., 187. When it starts to run during the lifetime of the ancestor, it does not stop, even though the heir is under disability at the death of the former, and at the time of descent cast. *Chancey v. Powell,* 103 N. C., 159; *Frederick v. Williams, ib.,* 189; Wood on Limitations, 11; *Pearce v. House,* term report, 722. It must appear that disability existed when the right of action accrued. *Gudger v. R. R.,* 106 N. C., 481. This being so, and all the evidence showing that the illness of Mrs. Scott occurred long after the accrual of the cause of action on the several notes—and there being no evidence, as we think, to the contrary—the court was right in dismissing the action.

The contention as to the trust relation between the defendant and the intestate is entirely without any merit. There is no sufficient evidence to sustain any such view with reference to these notes. The plaintiff was at the perfect liberty to sue upon them without making any demand.

There is no error in the proceedings of the court.

No error.

JAMES E. QUERY v. POSTAL TELEGRAPH CABLE COMPANY.

(Filed 10 December, 1919.)

1. **Telegraphs—Easements—Railroads—Rights of way—Superimposed Burdens—Damages.**

   The constructing and maintaining a line of telegraph poles and wires upon the right of way of a railroad company imposes an additional or new burden upon the owner of the fee, who is entitled to a reasonable and just compensation therefor.

2. **Same—Evidence.**

   As between the owner of the fee and a telegraph company, which by constructing and maintaining a telegraph line upon the right of way of a railroad company, has imposed a new or additional burden thereon, an instruction is correct, that the jury may consider, in awarding damages, that the fee was already subject to the burden of the railroad right of way; and it is *Held*, in this case, that the question of the diminuation in the value of the defendant's easement by the right of the railroad company to the full use of its easement was not a matter for the jury's consideration, especially as the contractual relations between these two corporations does not appear.

3. **Limitation of Actions—Telegraphs—Railroads—Rights of Way—Superimposed Burdens.**

   The three year statute of limitations, Rev., 395 (3), applies to an action by the owner of the land to recover damages against a telegraph company for erecting and maintaining a line of telegraph poles and wires thereon, and within the right of way theretofore acquired by a railroad company, such occupation, as between the parties, being wrongful, and presumed to be of a permanent or continuing nature. *Teeter v. Tel. Co.*, 172 N. C., 783, cited and approved. This action was commenced within three years after the entry upon the land.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at August Term, 1919, of CABARRUS.

The plaintiff alleges that the defendant erected certain poles on his land, within the right of way of the North Carolina Railroad Company, and strung wires thereon for the purpose of using the same in its business of telegraphy, and the defendant admits the other allegation that the plaintiff is the owner of the land, "subject to the right of way of the said railroad company," it being one hundred feet wide on each side from the center of the railroad track.

The court charged, among other things, as follows:

"The contention of the plaintiff is this: That those under whom he claims, and he himself, were and are the owners of the land in fee; that the railroad company entered upon the land by reason of the grant of a right of way from the grandfather of the plaintiff; that after the railroad company had taken the right of way the Postal Telegraph Company went upon the right of way and put up poles, and thereby imposed an additional burden upon the fee, and that the plaintiff is entitled to recover damages for such additional burden. If you answer the first issues 'Yes,' and the second issues 'No,' and you find that after the railroad company took possession of the property, the defendant, Postal Telegraph Company, entered upon the property and erected additional poles thereon, and strung wires on the poles, you will then find that the entry of the Postal Telegraph Company imposed upon the fee such additional burden as would entitle the plaintiff to recover, and, in that event, the question would be, What amount is the plaintiff entitled to recover by reason of such wrongful entry on the part of the defendant?"

Under the evidence and charge of the court, the jury returned a verdict for the plaintiff, assessing his damages at three hundred and fifty dollars. Judgment thereon, and appeal by the defendant.

L. T. Hartsell and M. H. Caldwell for plaintiff.
J. Lee Crowell for defendant.

WALKER, J., after stating the facts as above: The case turns principally on the question of damages, although defendant moved for a nonsuit, which was refused, and, as we think, properly so. There was no dispute as to the defendant's entering upon the land and erecting the poles and stringing the wires, the only issues being as to the ownership, and statute of limitations, and the damages. The first was answered "Yes," and the ownership was admitted for the purpose of the appeal. The statute of limitations does not apply, or more accurately speaking, is not a bar, for the jury found, as is shown by the evidence and the charge of the court, that the defendant entered upon the land in 1915, erected the poles, and strung the wires. The action was commenced on 11 May, 1917.

This Court said in *Teeter v. Tel. Co.*, 172 N. C., 783: "It is not denied by defendant that the telegraph line superimposed upon a railroad right of way is an additional burden, which entitled the owner to compensation. *Hodges v. Tel. Co.*, 133 N. C., 225; *Phillips v. Tel. Co.*, 130 N. C., 513; but objection is made to the validity of plaintiff's recovery on the ground, chiefly, that his Honor should have held as a conclusion of law that, on the facts in evidence, plaintiff's cause of action is barred by the three years statute of limitations, Revisal, sec. 395, subsec. 3, the language being as follows: 'Actions shall be brought within three years for trespass on real property. When the trespass is a continuing one, within three years from the original trespass, and not thereafter.' Speaking to this section in *Sample v. Lumber Co.,* 150 N. C., 165-166, action for wrongful entry and cutting timber on another's land, the Court said: 'True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter; but this term, "continuing trespass," was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some *quasi*-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong."

Referring to the language of subsection 3, above mentioned, and the meaning of it, as suggested in *Sample v. Lumber Co.,* it is further said by *Justice Hoke:* "The Court is inclined to the opinion that this is a continuing trespass within the meaning of the law, and for damages incident to the original wrong, and for that alone, no recovery could be sustained. But this is a suit for permanent damages, and on recovery and payment, so far as plaintiff is concerned, confers on the defendant the right to maintain its line on plaintiff's land for an indefinite period and to enter on the same whenever reasonably required for the 'planting, repairing, and preservation of its poles and other property.' *Caviness v. R. R., ante,* 305. It is a suit to recover for the value of the easement, which can pass to defendant only by grant or by proceedings to condemn the property pursuant to the statute, Rev., 1572-1573, or by adverse and continuous user for the period of twenty years."

The defendant, therefore, is entitled to an easement for an indefinite period of time, and the plaintiff to permanent damages as compensation therefor, which are to be assessed according to the rule stated in the *Teeter case.* See, also, *Hodges v. Tel. Co.,* 133 N. C., 225, and *Phillips v. Tel. Co.,* 130 N. C., 513, citing the well known cases of *Story v. Railroad Co.,* 90 N. Y., 122; *Lahr v. Same,* 104 N. Y., 368, as to the right of the abutting owners to compensation for the additional burden imposed upon the streets by the elevated railways. *White v. R. R.,* 113 N. C., 610, is also a well considered case in our own reports.

We now come to the real question in the case—the measure of damages. The defendant requested the court to instruct the jury to take into consideration the fact that when these poles were erected and the wires were strung, the land was already subject to the burden of the North Carolina

Railroad Company's right of way, and this was given by the court. The court charged the jury, as we have seen, that the defendant, by the erection of its telegraph line, had imposed an additional burden upon the land; in other words, a new one, in addition to that of the railroad right of way, already resting upon it, and that for this additional burden the defendant was under obligations to pay, and the plaintiff had the right to receive, reasonable and just compensation. The principle of *R. R. v. McLean,* 158 N. C., 498 (an action between the railroad company and the landowner), as to the probability of an appropriation by the railroad company of its entire right of way being considered in assessing permanent damages against it, does not apply to a case like this where the defendant's right of way is essentially of a different kind, and does not call for any such further appropriation, or any widening of its right of way, the boundaries of which are now fixed and fully occupied, and there is nothing to show that the railroad company can deprive the defendant of its rights in respect to the maintenance and operation of its present line. Whether it could do so must depend upon the right and easement which was acquired by the defendant from the railroad company, whether by contract, condemnation, or in some way equivalent to the latter method. If the railroad company should extend the occupation of its right of way further from the center of the track, it would not affect the question of damages in this case, unless it had the right to deprive the defendant of its right of way or some part of it, which does not appear in this record. We do not know what their contractual relations are. We think, though, that, in any view, the court adequately responded to the defendant's request for instructions, as made, and the jury must have understood that the assessment of damages should be made upon the basis of the right which the railroad company had already acquired in respect to the land, and its privilege of enlarging, under proper circumstances, the actual occupation of the right of way, even if that enlargement would impair the full enjoyment by defendant of its easement, which is not at all probable.

The amount awarded in the verdict does not appear to be excessive when all the facts are taken into account, and even if so, we cannot review it. *Phillips v. Tel. Co.,* 130 N. C., 513.

We affirm the judgment, finding no material error in the proceedings.

No error.

DAN BUCHANAN v. CRANBERRY FURNACE COMPANY.

(Filed 10 December, 1919.)

1. **Employer and Employee—Master and Servant—Safe Place to Work—Inspection.**

The employee does not assume the risk of dangers as being inherent in the class of services he is to perform when the injury received by him was caused by the negligence of his employer in performing his duty to furnish a reasonably safe place to work, of which dangers the employer knew, or should have known by reasonable inspection, and of which the employee was unaware, and was not reasonably presumed to have known.

2. **Same—Negligence—Master's Relative Duty—Dangerous Employment—Assumption of Risks—Evidence—Questions for Jury—Trials.**

The duty owed by the owner of a mine to his employee, a "mucker," working in a tunnel thereof, to furnish him a reasonably safe place to work and to keep it so by proper inspection, is a primary one; and where, under the rules of a mine, such employee was not permitted to enter the tunnel after a blast, until it had been inspected and "scaled," to prevent injuries from rocks jarred by the explosion and likely to fall, and there was evidence that either during the inspection, or thereafter, the defendant, and others under the direction of vice principals, entered the tunnel, and was injured by a falling rock, the danger of which had immediately been discovered by another employee who had been sent for a torch; and there was conflicting evidence as to whether such employee was warned or heard the warning given of the danger, not to him but to others, or went forward with his work upon being instructed to do so, and received the injury in consequence: *Held*, sufficient evidence for the determination of the jury upon question of the defendant's actionable negligence, and also as to the employee's assumption of risk, and was properly submitted to the jury instead of being decided as a matter of law.

3. **Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Nondelegable Duty.**

The employer may not delegate to another his duty to furnish his employee with a reasonably safe place to work and to maintain it so by reasonable inspection, and escape liability for an injury caused his employee by neglect of this duty by the person acting for him.

4. **Appeal and Error—Instructions—Correct in Part.**

Exceptions to the judge's charge will not be sustained on appeal when it includes a portion thereof that is correct.

5. **Appeal and Error—Instructions—Contentions—Objections and Exceptions.**

An erroneous statement of the appellant's contentions in the instructions of the court to the jury must be called to the attention of the judge, at the time, so as to afford him an opportunity to correct it, and if this is not done it will not be considered on appeal upon an exception thereafter taken.

6. **Appeal and Error—Instructions—Special Requests—Objections and Exceptions.**

Exceptions that the instructions of the court to the jury were not sufficiently full and explicit will not be considered on appeal. If the appellant desired any particular phase of the case to be presented to the jury, he should have requested a special instruction presenting it.

7. Appeal and Error—Instructions—Indefiniteness.

An instruction will not be held as error, for indefiniteness, when it appears, in connection with the charge and the evidence, that the jury must have fully understood it.

CIVIL ACTION, tried before *Long, J.*, and a jury, at July Term, 1919, of AVERY.

Plaintiff alleged that he was employed by defendant as a "mucker" in its mine, and was seriously injured by the falling of a rock in the mine, which struck his muck, or dump car, near which he was standing, while engaged in his work, and upset the same, lifting it on one of its ends, and that the car then fell on him and broke his leg.

Plaintiff and Ed. Hughes were working in the mine together as muckers. They had taken in a car the morning that plaintiff was injured, loaded, and it was rolled out of the mine by gravity, then returned to the mine. When they reached the place where they were to reload, they were told to scotch the muck car and wait until the scaling was finished. These hands were subject to the orders of George Tolley, who was foreman, Monnie McCoury was walking boss, who controlled the foreman, and Rube Cook was scaling boss. All of them were superiors of plaintiff, and gave him orders. Plaintiff had worked that morning in safety at the place where the rock fell on him. Rube Cook was scaling a part of the roof, but there was evidence that the rock fell at a place which had already been scaled. While they were scaling, Ed. Hughes was ordered to come up and hold the light, which he did, not using his own, but another lamp, and while standing there, he said: "There is a rock I do not like the looks of." Rube Cooke punched the rock and it fell. It struck the plaintiff's car, standing it on end, and the car then fell on plaintiff's leg, which was broken by the fall and seriously injured. The plaintiff was standing about five feet from the car when it struck him. He testified that he did not hear any one of them say to the other men, "Might not this rock hit the car," nor did he hear any one say, "You had better get away; might not this rock fall?" and nothing was said about the rock that he heard. He further stated that Mr. Cook was the scale boss, and that he did not tell them to "get out of the way," but merely said, "Watch out boys, they are scaling," and he knew what it meant, and got out of the way. He heard some one say, "All right, boys," while he was standing near the car, before the rock fell. Ed. Hughes testified:

"The rock that fell was not the one we prized out; Rube and I had pulled rocks all down to this rock, but had not followed down far enough to discern it. That was a portion of the mine that had been scaled earlier; they had scaled down and left this rock. That portion of the mine over this car had been scaled earlier in the morning; we had worked over that; we worked under that the first time. I do not know how long I have worked with Dan; not very long; Dan was as good a hand as I ever met with on Cranberry; would come as near doing what he had to do as I ever found. I am not still working at that mine; I have not worked there since last February, this year."

There was much more evidence of a like kind.

The defendant did not introduce any evidence, but at the close of plaintiff's testimony it asked for a nonsuit, which was refused, and it excepted.

Defendant also asked for the following instructions:

"1. If the jury find from the evidence the facts to be as testified to by the plaintiff, the plaintiff is guilty of contributory negligence, and you should answer the second issue 'Yes.'

"2. If you find from the greater weight of the evidence that the plaintiff came from a place of safety and stood by and looked at the scalers scale the wall out of curiosity, and could realize the danger as well as those engaged in the scaling, then the court charges you that this would constitute contributory negligence, and you will answer the second issue 'Yes.' "

The first of these instructions was refused, and the second was modified, as follows: "Nothing else appearing, the court gives you that instruction, as prayed by the defendant; that is to say, if you find the facts as contended for by the defendant, I give you the instruction as prayed."

The jury returned a verdict finding plaintiff was injured by the defendant's negligence; that there was no contributory negligence, and assessed the damages. Judgment, and appeal by defendant.

Charles E. Greene, W. C. Newland, and S. J. Ervin for plaintiff.

J. H. Epps, J. P. Johnston, F. A. Linney, and Merrimon, Adams & Johnston for defendant.

WALKER, J., after stating the facts as above: It is apparent, from the argument of this case, that the real question is as to the precise duty which the defendant owed to the plaintiff, with respect to the safety of defendant while at his work, and the duty owing by the defendant to himself. It is contended by the defendant's counsel that the master is not required to furnish a safe place for his servant to perform his work, and this is true, in the sense that he does not insure the safety of his servant. The true measure of the master's duty and obligation to his servant has been repeatedly stated by this Court, and corresponds exactly with what it is declared to be in the authorities cited by the defendant from other jurisdictions. We will refer to one or two of them. Take the case of *Zeigemeyer v. Cement Co.,* 88 S. W. (Mo.), 139-141, for example; the Court held there that the rule as to a safe place is not applicable to every state of facts, nor is the principle pertinent in every case, it having one well defined and fully established exception, which is, that the master is not required to furnish a safe place in which his servant is to work where danger constantly arises from the inherent hazard and progress of the work itself, or is incident to it, and is known to the servant. When the principle, as thus stated by that learned Court, is confined within its proper limits, and is correctly applied to the facts of the particular case, there is no fault to be found with it. We have had cases in this Court where we ruled substantially to the same effect, but they are based upon the reason that the master has no sufficient opportunity to discover the defect in the machinery, or the danger of the place, for the work, and the servant can just as easily see the danger when it appears as the master, and is aware that it is likely to arise at any time, it being an incident of the particular work in which he is engaged. The same may be said of other propositions, on which the defendant relies, and for which he cites *Thompson v. California Con. Co.,* 82 Pac., 386, where it is held that the master is not an insurer of his servant's safety, and that his duty to furnish him with a safe place to work is not an absolute one, but the obligation is performed when he exercises ordinary care to provide a reasonably safe place in which to do the work.

We undertook, in *Mincey v. R. R.,* 161 N. C., 467, at 470-471, to state the rule with respect to both tools and appliances to be used by the servant, and place to work, as follows: "The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. *R. R. v. Herbert,* 116 U. S., 642; *Gardner v. R. R.,* 150 U. S., 349; *R. R. v. Bough,* 149 U. S., 368; *Steamship Co. v. Merchant,* 133 U. S., 375. This undertaking on the part of the master is implied from the contract of hiring (*Hough v. R. R.,* 100 U. S., 213), and if he fails in the duty of precaution and care, he is responsible for an injury caused by a defect which is known to him and is unknown to the servant. *R. R. v. McDade,* 135 U. S., 554. These principles are fully supported by the following cases in this Court, and apply to machinery and tools or implements of simple as well as complicated construction. *Twiddy v. Lumber Co.,* 154 N. C., 237; *Reid v. Rees,* 155 N. C., 230 (ladder case); *Orr v. Tel. Co.,* 130 N. C., 627 (*S. c.,* on rehearing, 132 N. C., 691); *Avery v. Lumber Co.,* 146 N. C., 595; *Cotton v. R. R.,* 149 N. C., 227; *Marks v. Cotton Mills,* 135 N. C., 287; *West v. Tanning Co.,* 154 N. C., 44; *Nail v. Brown,* 150 N. C., 533, and *Mercer v. R. R.,* 154 N. C., 399 (hammer case), opinion by *Justice Allen,* in which it is held that the duty of inspection of tools and appliances does not extend to those of simple construction, such as hammers, chisels, axes, and others of like kind, where the employee is assumed to have equal knowledge and ability with the master for discovering the defect, if any. He is required to use it, and, therefore, is in a better situation to discover the imperfection of the implement and report it to the master for repair or the substitution of a new one."

After referring to the distinction as to small tools or implements, we further said: "This relaxation of the rule can have no application to a defect of which the master is actually cognizant, and which, as a reasonable man, he should appreciate is likely to result in injury to one using the implement as it is likely to be used, and which is neither known to the employee nor of such a character as to be apparent from the observation which may be expected to accompany its use. In such case the general rule of negligence is fully effective, and the master who knowingly and negligently exposes the employee to a peril unknown to the latter must respond for the damage which results."

We stated the same rule substantially in *Marks v. Cotton Mills, supra,* where it was said: "The employer does not guarantee the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. . . . He meets the requirements of the law . . . if he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety. . . . It is the negligence of the employer in not providing for his employees safe machinery and a reasonably safe place in which to work that renders him liable for any resulting injury to them. . . . The rule which calls for the care of the prudent man is in such cases the best and safest one for adoption. It is perfectly just to the employee and not unfair to his employer, and is but the outgrowth of the elementary principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When any injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employee, and he must bear the loss, it being *damnum absque injuria;* but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employees. To the extent that he fails in this plain duty he must answer to his employee for any injuries the latter may sustain which are proximately caused by his negligence."

The above cases, decided by this ourt, will be found, when properly considered, not to be at variance with any of those relied on by the defendant.

It has been held by this Court, and others, that the duty of providing a reasonably safe place where the servant may do his work is a primary and nondelegable one of the master, and is illustrated with respect to mines by the case of *Western Const. & Mining Co. v. Ingraham,* 70 Fed., 219, where it is held to be a positive duty which the owner of a mine owes to his servants, after the mine is opened and timbered, to use reasonable care and diligence to see that the timbers are properly set, and to keep them in proper condition and repair, and for this purpose to provide a competent mining boss or foreman, to make timely inspections of the timbers, walls, and roof of the mine. It is an absolute duty, which the master owes his servant, to exercise reasonable care and diligence to provide the servant with a reasonably safe place to work, having regard to the kind of work and the conditions under which it must necessarily be performed; and when the master, instead of performing this duty in person, delegates it to a servant, then such servant stands in the place of the master, and his negligence is the negligence of the master. The case cites many authorities to the same effect, and among them *Railway Co. v. Jarvi,* 10 U. S. App., 344 (3 C. C. A., 433, and 53 Fed. Rep., 65), where it is said, with reference to work in mines and the duty of the owner to his employees: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employee may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition, so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously, a far higher degree of care and diligence is demanded of the master who places his servant at work digging coal beneath overhanging masses of rock and earth in a mine than of him who places his employee on the surface of the earth, where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case, and, throughout all the varied occupations of mankind, the greater the danger that a reasonably intelligent and prudent man would apprehend, the higher is the degree of care and diligence the law requires of the master in the protection of the servant. For a failure to exercise this care, resulting in the injury of the employee, the employer is liable; and this duty and liability extend, not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended."

The danger, in our case, arose from the explosions or blasts which were calculated to loosen the dirt and rock in the sides and roof, and not from mere natural causes. And in this connection the case of *Every v. Rains,* 84 Kansas, 560, is a very instructive one. There it was held that it is not necessary that the master should have actual knowledge of the defective condition of a roof in a mine in order to be liable for a personal injury to an employee by the falling of a fragment therefrom, if in the exercise of reasonable care the defect would have been known and the resulting injury avoided. To ascertain the condition of the roof in a drift of a lead-and-zinc mine, the operators of the mine adopted the use of a prod, consisting of a piece of gas pipe, to test the roof and dislodge loose pieces therefrom. Whether the instrument made use of and the method and frequency of its use satisfied the requirement of reasonable care on the part of the master to make the place safe for the servants was, under the evidence, a question of fact for a jury. The contention of the defendants that the evidence and findings of the jury require the court to hold, as matter of law, that the injured employee assumed the risk of the danger by which he lost his life is not sustained. The Court further said: "It was the duty of the appellee to use reasonable care to put the bank in a condition and keep it in a condition which would render the operation of cars on the car track reasonably safe from all caving naturally to be anticipated in consequence of the steam shovel's work; and this duty required that the bank be inspected with the care and frequency which reasonable prudence demanded, under all the conditions presented," citing *Griffin v. Brick Co.,* 84 Kan., at p. 347. Both cases have features in common with this one. The mines were constructed in practically the same way, and the operations were similarly conducted. There were cars run by gravity one way, and the plaintiffs were hurt by rocks falling from the roof. The mines were operated by explosives, which loosened the clay and rock. Any defect, as loose overhanging rocks, if not discoverable by an inspection with the naked eye, could have been by prodding, as in this case. So that the similarity of the cases easily appears.

In *Every v. Rains,* the Court further said: "That the defendants did not know of the defect will not excuse them if in the exercise of reasonable care it would have been discovered. The evidence tends to show that the defendants knew that it was necessary to inspect this roof to guard against such injuries as the one causing the death of Every, and it was a proper question for a jury, under the circumstances presented, whether reasonable care had been exercised in making the inspection. The suggestion that the laborer could observe the defective roof as well as the employer is not persuasive. It was not the duty of the laborer to make inspection, but to attend to his work, while it was the duty of the employers to exercise proper care to make the place reasonably safe. It does not appear that the defect was open to the ordinary observation of the workmen, or that they were aware of the danger. It is insisted that Every assumed the risk of the injury, and that this is shown by the evidence, and by the special findings. It is said that the findings show that he was as well able to determine whether the drift was dangerous as all others who were working there. This may be true, and yet the defendants may be liable. The risks assumed by a servant in such a situation are stated in *Griffin v. Brick Co., ante*, p. 347, and need not be restated here. If Every knew that proper inspection had not been made, there is no finding that he was aware of the danger arising from the failure." citing authorities.

And again: "The servant does not accept the risks of unknown, latent, unseen, or obscure defects or dangers, such as the servant would not discover by the exercise of ordinary care and prudence, having reference to his situation, but such as the master ought to discover by exercising the duty of inspection, which the law puts upon him to the end of seeing that the premises, tools, and appliances, with respect to which the servant is required to labor, are in a reasonably safe condition." citing 4 Thompson Com. on Negligence, sec. 4641. *Deaton v. Lumber Co.*, 165 N. C., 560.

To these cases may be added *Quincy Coal Co. v. Hood Admr.*, 77 Ill., 68. It was held in *Ribich v. Smelting Co.*, 123 Mich., 401, that where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, so far as possible, citing *Smith v. Car Works*, 60 Mich., 501 (1 Am. St. Rep., 542). It has been held that "A corporation is responsible to its servants for the negligence of others servants entrusted with the duty of providing a safe place in which to work." Shearman & Redfield on Negligence (5 ed.), p. 341, sec. 205. The Court, when speaking of the duty of mine owners to their employees, said in *Mather v. Rillston*, 156 U. S., 391: "If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of." "A master," says the same Court, in *Railroad Co. v. Baugh,* 149 U. S., 368, "employing a servant, impliedly engaged with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his servants in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to insure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the discharge of some positive duty of the master." The Court further says that if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. 3 Labatt's M. & S. (2 ed.), says, at sec. 1029 (p. 2727): "It is well settled that an employer is presumed to be familiar with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged. Such knowledge is imputed to him on the ground that a person who combines with the ordinary measures of intelligence, which the law assumes every responsible citizen to possess, the special acquirements of persons engaged in the given occupation cannot, supposing him to have made a reasonably careful use of his faculties, fail to understand the extent and nature of the perils normally incident to that occupation. This doctrine requires him to take notice of the normal characteristic properties of the material substances which he uses, and the physical and mechanical laws which operate upon them."

And at section 2097 it is said: "Where the servant is not safeguarded by immediate abandonment of the use of the defective instrumentality, or by its immediate restoration to a condition of normal safety, it is clearly the duty of the master to warn the servant of the danger to which he will be exposed, unless he is known to have received information as to this from other sources."

And again, at section 1016 (p. 2699): "The circumstances may sometimes be such that a jury would be justified in inferring that he ought also to have given the servant such instructions as would have enabled him to protect himself more effectually, during the period which was to elapse before the dangerous conditions could be remedied. It is conceived, therefore, that the true principle in this connection is that, under the circumstances supposed at the commencement of this section, the master is always culpable if he does not warn the servant, and may or may not be subject to an action on other grounds, even though he may have given the servant adequate warning."

The warning must, of course, be reasonably sufficient to put the servant on his guard, and so as to enable him to place himself beyond reach of the danger. *Rodney v. S. W. Railroad Co.*, 127 Mo., 676.

Labatt further says, 3 vol., sec. 1021: "It is well settled that a master must respond in damages for an injury resulting from abnormally dangerous conditions, of the existence of which he was actually aware. This doctrine is immediately deducible from the general principle that knowledge is an essential ingredient of negligence, and that a person is always held liable for the natural and probable consequence of his own want of care. The master's knowledge of a dangerous defect in the place of work, or the instrumentalities thereof, raises this duty to warn his servant. This is a natural duty, prompted by a sense of common humanity."

Applying these principles to the facts in hand, we find that the defendant had regularly inspected the side walls and roof of the mine after a blast, and sealed the same to remove any loose, or overhanging rock, before the mucking of the mine began. The hands were not usually allowed to enter the mine until this was done, and it would be exposing them to an unnecessary danger if they had been permitted to do so, for the rocks were very large, the one in question weighing nearly a ton. The morning of the accident it seems that the inspection and sealing were not completed when the hands entered the mine with the cars for the purpose of removing the muck. The plaintiff and Hughes had, earlier in the day, filled their car under that part of the roof from which the rock fell, and taken it out of the mine. They returned and were ordered to stop, or wait, until the walls were sealed, and they scotched their car and waited. It seems that the rock first attracted the attention of Hughes, who had been ordered to come with his light. When he saw it he said: "There is a rock I do not like the looks of." This was in a part of the wall where an inspection had been made and sealing done.

If Hughes discovered, when he first saw it, that the rock was in a dangerous position and likely to fall, it was evidence from which the jury might reasonably infer that the inspection and scaling had not been carefully performed, and it would, therefore, be evidence of negligence, for inspection is one of the master's primary duties to his servant, and cannot be delegated, so as to relieve him of responsibility. It is the same as if he had done it himself. Whether the rock fell from a part of the wall which had been gone over that morning, or from a section of it which was then being scaled, was a question for the jury upon the evidence. It is the master's duty, when he discovers a danger, of which the servant is ignorant, to give him reasonable warning of the same, so that he may take proper care of himself.

"It makes no difference what is the nature of the peculiar peril, or whether it is or is not beyond the master's control. And it is not enough for the master to use care and pains to give such notice. He must see that it is actually given. If, therefore, he fails to give such warning, in terms sufficiently clear to call the attention of his servants to a peril of which he is or ought to be aware, he is liable to them for any injury which they suffer thereby without contributory negligence. Such notice must be timely—that is, given in sufficient time to enable the servant to profit by it. It is, therefore, the duty of the master to give adequate and timely warnings of changes in the situation involving new dangers." 1 Sh. & Redf. on Negligence, sec. 203, and note 5.

Under the evidence the jury could have found that the defendant knew of this danger, through Hughes, and that the servant did not know of it, and was not properly warned. Ed. Hughes spoke to the others about it, but plaintiff was standing some fifteen feet away, near his car, and Hughes testified that he might have heard his remark, though it was not addressed to him, if he was listening. There was no other evidence that he had heard it, nor that he was listening at the time, and the plaintiff said that he did not hear it. So that the situation is a simple one. The company knew of the danger through those placed there by it in charge of the work, and failed to properly notify the plaintiff, as the jury could have found, and no doubt did find, when the verdict is construed in the light of the evidence and the charge, as should be done. The plaintiff testified that it was the custom to cry out, "All right," when they had finished the scaling, and that some one did so; that he thought it was "all right" to push the car in there for loading. He did so and stepped back to his car and below it, and waited for his partner, Ed. Hughes, to come and help him, and "that was the last he knew," as the rock then fell from the roof and knocked him down.

This was very dangerous work, and it behooved the master to exercise that degree of care which the situation, known to him, suggested as reasonably necessary for the protection of his servant, and which a man of ordinary prudence would have taken in like circumstances. It is evident, and we think the jury has so found, that the plaintiff was ignorant of his unsafe condition. He had worked the same morning, and safely, under the same rock that fell, and he discovered no defect in the roof, nor had the inspector until Ed. Hughes came up with the light; he was standing where orders had placed him, and stayed there in the full consciousness of being safe, though it proved that he was really within the zone of danger. He would have gone further away and to a place of absolute safety, as we must suppose, if the master had performed his duty and made known to him that the rock was likely to fall, after he, or the person who represented him, had acquired knowledge of the servants's perilous position. There was evidence that the inspector was negligent in not discovering the defect, for Ed. Hughes noticed it when he was called there to bring the lantern. A servant assumes all the usual and ordinary risks attendant upon his employment, not including risks arising from negligence of the master, and he assumes the latter, as well, if he knows of the defect from which they arise, and appreciates the dangers which flow from such defects. *Fotheringill v. Washoe Copper Co.,* 43 Montana, 485. But he did not know of this defect, and could not, therefore, appreciate the danger.

We are of the opinion, after a careful examination of the case, both law and fact, that there was ample evidence of negligence to support the verdict.

Exceptions were taken to the charge of the court, but we regard it as free from error. Most, if not all, of the objections to the charge are condemned by the rule that where there is more than one proposition embraced by that portion of the charge to which exception is taken, and any one of them is correct, the exception as a whole will fail. *Quelch v. Futch*, 175 N. C., 694, and cases cited. As an example of this class of exceptions: The court charged, among other things, that it is not the duty of the defendant "to insure the plaintiff against any possible injury." We do not presume the defendant would except to such an instruction, and yet it is found separately stated among others, and to all of these exception was taken. Some of the exceptions are to the statement of contentions, which we will not review unless the statement was not only erroneous, but the court's attention was called to it at the time, when the judge had opportunity to correct the mistake. *Mfg. Co. v. Bldg. Co.*, 177 N. C., 103; *Alexander v. Cedar Works, ib.*, 138. The modification of the second prayer for instructions, as to contributory negligence, was not erroneous. The court should not have given the instruction if based on facts contrary to defendant's contention, for in that case there would be no contributory negligence. But we think the instruction might well have been refused, as the evidence did not justify it without amendment, if it was justified at all. The second request for instructions was properly refused, as the evidence of plaintiff would not warrant such an instruction. There was evidence to show freedom from negligence on the part of plaintiff.

If the defendant desired an instruction as to the second breaking of the plaintiff's leg, he should have asked for it. This was its plain duty. *Simons v. Davenport,* 140 N. C., 407; *Potato Co. v. Jeanette,* 174 N. C., 237; *Alexander v. Cedar Works,* 177 N. C., 137. In the case last cited, we said: "If the instructions of the court to the jury were not sufficiently full and explicit, or plaintiffs desired any particular phase of the case to be stated, they should have submitted a special request for what they wanted." The judge states that no such request was made in this case.

The motion for nonsuit was properly overruled.

The other exceptions are plainly insufficient to cause a reversal. Directing the jury to ascertain "what the trouble is," must have been understood by them, and is without any harm to the defendant. Besides, what was meant was afterwards fully explained. This exception also is to several propositions, and fails under the rule before stated.

We have carefully considered this case in all its aspects, and find no error in the record.

No error.

BEN WARREN CHAMBERLAIN v. CHARLES F. DUNN.

(Filed 1 October, 1919.)

Clerks of Court—Funds—Adverse Claimant—Identification—Judgments—Mortgages.

A contest as to the ownership of surplus funds paid into the hands of the clerk of the Superior Court under execution on a judgment obtained upon notes secured by mortgage, was made to depend upon whether or not the plaintiff was served with summons in the former action, and the defendant having testified that he had been served, and not his son with a similar name: *Held*, it was proper to permit him to be cross-examined as to the mortgage notes and credits thereon, for the purpose of identifying the plaintiff as the one who had been served in the former proceedings.

APPEAL by defendant from *Guion, J.*, and a jury, at June Term, 1919, of LENOIR.

Cowper, Whitaker & Allen and J. L. Hamme for plaintiff.
Rouse & Rouse for defendant.

PER CURIAM. The parties contested for the possession of a fund in the custody of the clerk, and the controversy involved the question as to whether the plaintiff had been served with process in the cases wherein two judgments had been rendered. If he was served, the issue should be answered "No," and if he was not, it should be answered "Yes," the issue being, "Is plaintiff entitled to the fund in dispute?" The jury answered it "Yes." The defendant testified, in his own behalf, to show that plaintiff had been served with process, and was the defendant in the judgments, and he was cross-examined, as to certain notes (secured by mortgage), upon which it was alleged that the judgments were taken, and about the credits or entries thereon. This cross-examination was properly permitted, as it tended to throw light upon the questions involved, whether the plaintiff was the person who was served with the process in those actions, and whether the judgments were rendered against *him*. The judge, in his charge, explained the matter fully to the jury, and stated what was the object of the cross-examination, and how it bore on the case, and to what extent the matters elicited by it could be used by them; that is, only to identify the true defendant in the judgment, whether it was the father (the plaintiff in this action), or his son, who had a somewhat similar name. The defendant alleged that the judgments were against plaintiff, who was always known as Warren Chamberlain, while plaintiff contended that they were against his son, who was named Warren Chamberlain, while his own name is Ben Warren Chamberlain, and by that name he had always been known. The relevancy of the facts disclosed by the cross-examination is apparent from this statement.

There is no fault in the charge.

No error.

J. J. WRIGHT AND SONS v. L. L. SHEPARD.

(Filed 22 October, 1919.)

Principal and Agent—Commissions—Evidence—Instructions.

Held, this case involved only issues of fact as to whether the plaintiff was entitled to his commission on the sale of land for defendant, or whether the defendant had properly withdrawn the agency upon notice, and had sold the land himself; and it appearing that upon the evidence the judge had properly instructed the jury, no error is found.

APPEAL by plaintiff from *Stacy, J.*, at the December Term, 1918, of NEW HANOVER.

This is an action begun before a justice of the peace to recover the sum of $75, which the plaintiff alleged was due him as his commission upon the sale of a piece of property, which the defendant had given to the plaintiff, who was a real estate dealer, to sell for him. Upon appeal to the Superior Court there was one issue submitted to the jury: "Is the defendant indebted to the plaintiff; if so, in what amount?" The jury answered the issue "No," and the plaintiff appealed from judgment for defendant.

McClammy & Burgwin for plaintiff.
W. F. Jones for defendant.

PER CURIAM. The controversy was one of fact, the plaintiff contending that he was employed by the defendant to sell his lot; that he procured a purchaser to whom the defendant afterwards sold, and the defendant that the plaintiff could not procure a purchaser at the price he was authorized to sell; that he withdrew the lot from the plaintiff, and then sold it; and it has been submitted to the jury under proper instructions, which not only required the defendant to show that he gave notice to the plaintiff that the lot was withdrawn, but also that this was done in good faith.

No error.

W. B. COOPER v. W. A. HAIR.

(Filed 22 October, 1919.)

Judgment—Credits—Execution Suspended—Reference.

Where, under claim and delivery in an action, plaintiff has seized personal property of the defendant, including certain notes, which should have been allowed as a credit to the defendant by the referee, but not considered by him, though the question had been raised by the defendant's pleadings and exceptions, the execution on the judgment confirming the report adverse to defendant will be suspended until the proper amount of the credit can be ascertained and given. *Smith v. French*, 141 N. C., 1, cited and approved.

APPEAL by defendant from *Calvert, J.*, at the August Term, 1919, of BLADEN.

This is an action on two notes, one for $1,254 secured by an agricultural lien, and the other for $287.78, secured by notes deposited as collateral, and an account for fertilizers also secured in said lien.

The plaintiff sued out claim and delivery papers in the action under which twenty-five bushels of corn and the collateral notes were seized and delivered to the plaintiff in January, 1916.

The issues joined between the parties were referred by consent and the referee has made a full report except that he does not find the value of the notes delivered to the plaintiff, and the defendant has received no credit therefor, although in his answer he demanded that the plaintiff be charged with the value of the notes, and he made this same demand in his exceptions to the report of the referee, and at the time the judgment was signed.

Judgment was entered in favor of the plaintiff, and the defendant appealed.

Bayard Clark, McLean, Varser, McLean & Stacy, and Sinclair & Dye for plaintiff.

E. F. McCulloch, Jr., for defendant.

PER CURIAM. The defendant is entitled to be credited with the value of the notes seized in this action and delivered to the plaintiff, under the authority of *Smith v. Franch,* 141 N. C., 1, and the execution upon the judgment is suspended until this amount can be ascertained by reference or otherwise, and due credit be given.

We have examined the other exceptions relied on by the defendant and find no error.

Modified and affirmed.

EDITH JOHNSON v. L. S. COVINGTON ET AL.

(Filed 12 November, 1919.)

Appeal and Error—Rules of Court—Motions—Dismiss Appeal—Certificate—Transcripts—Clerks of Court.

The clerk of the Superior Court, upon payment of the costs of the certificate, is without authority to refuse to sign the appellee's certificate, under Rule 17, to docket and dismiss the appeal in the Supreme Court for the appellant's failure to docket his appeal under the rule, and his refusal to do so, based upon the ground that appellant had paid him on account for making out the transcript, is an attempt to pass upon the rights of the parties on questions reserved for the Supreme Court: it being required of the appellant in such cases, either to apply for a *certiorari,* or answer appellee's motion and show cause why his appeal should not be dismissed.

MOTION by the defendant to docket and dismiss the appeal of plaintiff under Rule 17 of this Court.

McIntyre, Lawrence & Proctor for appellee.

No counsel for appellant.

PER CURIAM. This case was tried at March Term, 1919, of RICHMOND. On motion of the defendant the plaintiff was nonsuited at the close of the evidence and appealed. The case on appeal was agreed and filed in the office of the clerk of the Superior Court of Richmond some months ago.

The transcript on appeal, not having been docketed here in the time required at this term, the appellee prepared the certificate required by Rule 17 for this motion and forwarded the same to the clerk of Richmond with request to sign the same. The clerk of Richmond telephoned the defendant's counsel, who resided in Robeson, that the plaintiff's counsel had two weeks previously come to his office and paid him $20 on account for making out the transcript, and requested him to prepare the same, and declined to sign and return the certificate.

This action of the clerk was entirely without authority, and the appellee was entitled to said certificate upon application and payment of the costs of the certificate. It was for this Court, and not for the clerk below, to decide upon the rights of the parties as to the motion to dismiss. If this were not true, it would be in the power of a clerk below to control the course of appeals to this Court.

It would seem that the appellant was in laches for putting off his application for the transcript of the record until just before the time when it should have been sent up, though the appeal was taken in March last, and he was further in laches that when the clerk delayed in making out the transcript he did not take steps to have it made out himself and certified to by the clerk. If there was any valid excuse the appellant should have filed his application for a *certiorari,* in apt time, in this Court or have answered the motion to dismiss under Rule 17 by showing cause.

The rights of the appellee cannot be thus denied, and the motion to dismiss under Rule 17 must be granted.

Motion allowed.

W. W. WATT v. SHAPLEIGH HARDWARE COMPANY.

(Filed 19 November, 1919.)

Evidence—Instructions.

Held, a question of fact for the jury under correct instructions given them.

APPEAL from *Adams, J.,* at February Term, 1919, of MECKLENBURG, from judgment upon these issues:

"1. Is the defendant indebted to the plaintiff? 'Yes.' If so, in what amount? Answer: '$2,943.66.'

"2. Has the defendant tendered to the plaintiff any payment upon plaintiff's alleged indebtedness? If so, what is the amount of the tender and the date thereof? Answer: 'Yes; $1,493.61, on 26 August, 1918.'"

From the judgment rendered the defendant appealed.

E. R. Preston and Clarkson, Taliaferro & Clarkson for plaintiff.
A. B. Justice for defendant.

PER CURIAM. Upon an examination of the record in this case, the Court is of opinion that the only question involved is one of fact, which has been determined by the jury in favor of the plaintiff under a clear charge, free from error.

No error.

NINFA MORMINO MASCARI, A. J. LYMAN, ADMR., ET AL. V. W. H. LASATER AND J. W. WOLFE.

(Filed 10 December, 1919.)

Evidence—Contracts—Lands—Fraud—Questions for Jury—Trials.

In this action to enforce a contract to purchase land wherein plaintiff's title was denied upon the alleged existence of a prior similar contract made with another, with allegation and evidence that the prior contract had been procured by fraud: *Held*, there was sufficient evidence to sustain a verdict and judgment in plaintiff's favor, and no error found upon the trial sufficient to disturb them.

APPEAL from *Finley, J.*, and a jury, at October Term, 1919, of BUNCOMBE.

Verdict and judgment for plaintiff, and defendant, W. H. Lasater, excepted and appealed.

Mark W. Brown for plaintiff.
Merrimon, Adams & Johnston for defendants.

PER CURIAM. The action was instituted by Mrs. Ninfa Mormino Mascari against W. H. Lasater and J. W. Wolfe to enforce a contract to purchase a lot belonging to plaintiffs, against the defendant, J. H. Wolfe, and to remove cloud upon plaintiff's title, created by a previous contract on part of Mrs. Mascari, the original plaintiff, to sell the same lot to W. H. Lasater, the ground of relief alleged against said Lasater being that his contract was procured by false and fraudulent representations on his part, inducing Mrs. Mascari to execute the same. Mrs. Mascari having died, her surviving husband, her three children and heirs at law, and A. J. Lyman, her administrator, were substituted as parties plaintiff seeking relief. Defendant Wolfe answered, admitting his agreement to buy at the price of $17,000, and his willingness to comply in case there should be no valid interference by reason of the previous contract with defendant Lasater. On the part of the latter there was denial of all allegations of wrongdoing, and averring that he held a valid contract for the property, duly registered, etc.

On issues submitted the jury rendered a verdict, in effect, that Mrs. Mascari was induced to execute the contract under which Lasater claimed his interest by false and fraudulent representations on his part; that the husband, Charlie Mascari, had neither signed nor acknowledged any execution of the alleged contract; that the *feme* plaintiff had not been privily examined touching her execution of the same, etc.

Upon the answer of defendant Wolfe, and the verdict on the issues between plaintiffs and defendant Lasater, there was judgment that said Wolfe comply with his contract of purchase; that the alleged contract with Lasater be declared void and of none effect; that he has no interest in the lot in controversy, and that reference to the judgment be entered on the registry docket of Buncombe County, where the instrument had been recorded, etc.

The controversy between these parties, almost exclusively one of fact, has been determined by the jury in plaintiff's favor. There were facts in evidence to justify the verdict, and we find no reason that will justify the Court in disturbing the results of the trial.

The objections to the rulings of the Court on questions of evidence can none of them be sustained. Some were very properly not insisted on in the brief, and those contended for are without merit, and could have had no appreciable effect or significance in the determination of the issues.

On careful consideration, we find no prejudicial error in the proceedings, and the judgment in plaintiff's favor is affirmed.

No error.

VIRGINIA-CAROLINA FARMS CO. v. BOARD OF DRAINAGE COMMISSIONERS OF CARTERET COUNTY.

(Filed 20 December, 1919.)

Drainage Districts—Preliminary Work—Mortgages—Liens—Priorities—Parties—Judgment—Estoppel.

Where a drainage district, incorporated under chapter 442, Laws 1909, and amendments, has accepted the preliminary work done by another corporation, including surveys, excavations, etc., and it has been recommended by the viewers, in their final report, that this work be availed of by the district, and that compensation therefor be made, and the report confirmed by order of court, though the corporation doing this preliminary work has made no prior claim upon the viewers, and no damages have been assessed to compensate them, but the work has been found necessary and the amount reasonable, or a saving to the district, the judgment does not estop the corporation, the plaintiff in the action, from now presenting its claim for such compensation, but a decree that it shall be paid, and the drainage commissioners are within their authority to include the same within the amount necessary to complete the work; and this will not impair or affect the amount of bonds to be issued for its completion; and it it *Held*, that the bonds so issued will have precedence over mortgage and all other liens except taxes due or to become due, whether such lienors have been made parties or not.

CONTROVERSY without action, submitted to *Kerr, J.*, at Fall Term (8 November), 1919, of CARTERET.

The following is the case agreed:

1. The plaintiff, Virginia-Carolina Farms Company, Inc., is a corporation duly created and organized under the laws of the State of Virginia; that the board of drainage commissioners of Carteret County Drainage District No. 1 is a corporation duly created and organized under the drainage proceedings hereinafter referred to, and by virtue of chapter 442, Acts of 1909, as amended; that Core Sound Farms, Inc., is a corporation, duly created and organized under the laws of the State of North Carolina.

2. That the plaintiff and said Core Sound Farms, Inc., filed their petition before the clerk of the Superior Court of Carteret County to establish a drainage district under the general drainage law of North Carolina, being chapter 442, Public Laws of 1909, as amended, following which, and in due course, a board of drainage commissioners of Carteret County Drainage District No. 1 were duly elected and organized, and now constitute the corporation defendant of that name; that the members of said board are G. S. Spear, chairman, who is also president of the plaintiff company, and Charles M. Talmadge, and William Gale, the said William Gale being vice-chairman, and said Charles M. Talmadge, secretary of said board; that a transcript of the entire record in the proceeding for the establishment of said drainage district is attached hereto and made part hereof, including the minutes of said board.

3. That said drainage district comprises an area or body of land containing about 32,867 acres, of which about 29,700 acres are owned by the plaintiff, and the balance by Core Sound Farms, Inc., said lands also constituting Carteret Township in Carteret County. That said lands are also included and described in two mortgages or deeds of trust, duly

executed and recorded in Carteret County prior to the institution of said drainage proceeding, securing bonds in the principal amount of about $281,000, which bonds are now held by various persons or corporations; that neither the mortgagees nor trustees under said mortgages or deeds of trust, nor the bondholders secured thereby, have ever been made parties to said drainage proceeding; that the facts stated in the petition in said drainage proceeding, in respect of the character and condition of the lands therein described, and the necessity for drainage thereof, are true, and the work already done demonstrates that said lands can be drained and will be materially enhanced in value thereby.

4. That preliminary to the institution of said drainage proceeding, plaintiff caused investigation, surveys, and plans to be made looking to the development of said lands, and to the establishment of a drainage district to drain the same at a cost of $17,531, as set out in the final report of the engineer and viewers who made use of or adopted the investigations, surveys, and plans which plaintiff had so caused to be undertaken, and said amount of $17,531 is not in excess of the reasonable value thereof, and, in fact, it is less than would be the actual cost of doing the same work or same character of work over again.

5. That in contemplation of the establishment of said district, the plaintiff also caused construction work to be undertaken on several of the canals of the proposed drainage system or district and yardage to the amount of 391,233½ cubic yards were excavated, it being the same work referred to in section 4 of the original petition; that a copy of the map accompanying the final report of the engineer and viewers is also filed herewith and made part hereof, showing the entire drainage plan or system, and the work heretofore done by plaintiff is in accordance therewith, and would now have to be done as part of the drainage plan or system at increased cost and involving further delay; and same was taken over and made part of the proposed plan and improvement.

6. A contract has been let by said board of drainage commissioners for the construction and completion of the canals of the district to Northwestern Drainage Company at the price or rate of 16 cents per cubic yard, which is now a fair price for work of that kind, but performance of this contract has not begun, and, in fact, is being held up by the conditions hereinafter recited; that in order to pay for the work to be done, the said board proposed to issue bonds in the principal amount of $330,000, which included a sum sufficient to reimburse the plaintiff for the excavations heretofore done by it at the contract price of 16 cents per yard, together with an estimated amount for interest, maintenance, and incidental expenses, which bonds will bear interest at the rate of 6 per cent per annum, and will be payable in ten annual equal installments, as to the principal thereof, the interest being payable semiannually, the

first installment of principal being payable three years after date of issue, in accordance with the drainage law; that of this total issue of $330,000, said board of drainage commissioners proposed to execute and deliver bonds to plaintiff in payment for the construction theretofore done by it, as aforesaid, which plaintiff agreed to accept at the contract price, and to include therein the engineering and other preliminary costs advanced by it, amounting to $17,350, the result of this arrangement being that the actual cost of the district will be less than if it were now to make the expenditures for this purpose, and resolutions were adopted by the board pursuant to this arrangement, which resolutions are set out in the attached transcript.

7. All the lands within the district owned by the plaintiff, and by Core Sound Farms, Inc., have been classified, and will be assessed for such amounts as are necessary to pay and discharge the said bonds and interest as and when due, and no objection or exception has been made or taken by any party to the drainage proceeding to any order therein or report therein, or to any resolution of the board, but the board is now advised and believes that it is, or may be, without authority to issue and deliver bonds to plaintiff for the amount heretofore advanced, or for work heretofore done by it, and prospective purchasers of or bidders on the total bond issue have refused to accept or to comply with their bids on the ground that the total issue would be invalid or illegal, and the assessments made unauthorized as to the total issue, and assessments therefor included an amount sufficient to reimburse the plaintiff, as aforesaid, and that the Northwestern Drainage Company has also refused to take bonds in payment for the work to be done by it for the same reason.

8. The board took the action and adopted the resolutions set out in the transcript filed herewith in the belief that it had the right, and that it was its duty, to reimburse plaintiff, and to issue and deliver bonds for that purpose, as aforesaid, and was about to proceed in accordance therewith, but was confronted with inability to sell the total bond issue, in consequence of which the prosecution of the work has been held up; that the plaintiff insists that the action of the board is lawful and demands that the bonds be issued and delivered to it in the sum of $62,645.37 for money advanced on work done, as aforesaid, and assessments made to pay the same as part of the total bond issue of $330,000, and that the bonds so issued and delivered to it should be neither the first nor last in time of payment, but should be a proportionate part of the entire issue, without distinction as to priority, or otherwise; that the board, being a *quasi*-public corporation, is advised and believes that it is not bound to issue and deliver bonds to plaintiff, notwithstanding its resolution in that regard, and is further advised and believes that if it

does so it will not only jeopardize the entire issue, but make it impossible to sell the same, although admitting that the district has received benefits for the money advanced and work done by plaintiff at least equal to the amount claimed by the plaintiff.

Wherefore, having agreed upon the foregoing statement of the facts, the parties to this controversy now submit to the court the following questions:

(1) Whether the board of drainage commissioners of Carteret County Drainage District No. 1 is required or authorized to reimburse plaintiff for the amount advanced and work done by it to the amount of $62,645.37, and to levy and collect taxes therefor.

(2) Whether the validity of the total issue of $330,000 will be affected or prejudiced by the execution and delivery to plaintiff of bonds for the amount due it out of the total issue.

(3) Whether the bonds so issued will constitute a first and paramount lien on all the lands within the district, subject only to State and county taxes, as provided in the drainage law.

It is agreed that if the court shall be of opinion with plaintiff, it shall enter such judgment or decree as ought to be entered upon the facts to compel and validate the total bond issue of $330,000, and the delivery to plaintiff of bonds for the amount due it, but if the court should be of opinion with defendants, it shall enter such judgment or decree as ought to be entered in the premises.

SMALL, MACLEAN, BRAGAW & RODMAN,
Attorneys for Plaintiff.
J. F. DUNCAN,
Attorney for Defendant.

His Honor rendered the following judgment:

"This cause coming on to be heard before his Honor, John H. Kerr, judge presiding in the courts of the Fifth Judicial District, Fall Term, 1919, upon the facts agreed in the above entitled controversy submitted without action, and the court being of opinion that the plaintiff, Virginia-Carolina Farms, Inc., is entitled to be reimbursed for the amount advanced and work done by it in the construction of ditches, drains, and watercourses now embraced within the Carteret County Drainage District No. 1, which system of ditches, drains, and watercourses has been taken over and become a part of the said drainage district, and landowners therein are now the beneficiaries, the court finding as a fact that the amount sought to be recovered by the plaintiff for said construction work is less than the said drainage district, after its establishment could have procured the said work to be done, and further, that the said board of drainage commissioners of said Carteret County Drainage District

No. 1, in good faith, undertook and agreed to reimburse plaintiff for the amount expended in said construction work, and to issue and deliver its bonds for that purpose.

"And the court being further of the opinion that the validity of the total bond issue contemplated by the said board of drainage commissioners of said district will not be affected in any respect by the execution and delivery to plaintiff of bonds at par, for the amount due to plaintiff for construction work, and that such bonds, when so issued, will constitute a first and paramount lien on all the lands within the said district, subject only to State and county taxes, as now provided by law:

"It is now, therefore, adjudged and decreed that the plaintiff, Virginia-Carolina Farms Co., Inc., is entitled to recover of the defendant board of drainage commissioners of Carteret County Drainage District No. 1 the sum of sixty-two thousand six hundred forty-five and 37-100 dollars ($62,645.37) by way of reimbursement or payment for money advanced or work done in the construction of drains, ditches, and waterways, now constituting a part of the drainage system of said district, and that the said defendant, the board of drainage commissioners of Carteret County Drainage District No. 1, be, and the same is hereby, authorized and empowered to issue its bonds for construction work, as provided by law in such cases, and out of the proceeds of sale thereof to pay to the plaintiff the aforesaid sum of $62,645.37, and to make such assessments upon the lands within the said district as will be sufficient to provide for the payment of interest on such bonds and to retire the same at maturity, as now provided by law applicable to drainage bonds and assessments for drainage purposes.

"It is further adjudged and decreed that the bond issue of $330,000 proposed to be issued by said board of drainage commissioners of Carteret County Drainage District No. 1, for the purposes set out and specified in this controversy submitted without action, is a legitimate and proper exercise of this power by the said board of drainage commissioners, and that the said bonds, when so issued, will be valid and will constitute a first and paramount lien on all the lands within the district, subject only to State and county taxes, as now provided by law, prior to the lien of any mortgage or deed of trust now and heretofore existing under the lands in said district.

"It is further ordered and decreed that the defendant, board of drainage commissioners of Carteret County Drainage District No. 1, pay the costs of this proceeding, to be taxed by the clerk.

JOHN H. KERR,
Judge Presiding.

Defendant appealed.

Small, MacLean, Bragaw & Rodman for plaintiff.
Julius F. Duncan for defendant.

PER CURIAM. There are three questions presented in this appeal:

1. Is the board of drainage commissioners of Carteret County Drainage District No. 1 authorized and required to reimburse plaintiff for the moneys advanced and work done by plaintiff ($62,645.37), and to levy and collect assessments on the lands in said district to that end? Or does the fact that compensation was not claimed by plaintiff for existing canals and drainways, etc., and that damages were not assessed therefor, under section 11 of the Act of 1909, with subsequent confirmation of the final report of the viewers, estop plaintiff as *res judicata?*

2. Will the delivery of bonds to the amount of $62,645.37, par value, to plaintiff, for such purpose, out of a total issue of $330,000 of drainage bonds, in any way affect or prejudice the validity of said issue, or of any of the bonds of said issue?

3. Will the bonds of the district, to the full amount of $330,000 issued as proposed, constitute a first and paramount lien on all the lands within the district, subject only to State and county taxes (as provided by the North Carolina Drainage Law), notwithstanding that bondholders, mortgagees, or trustees, relying upon liens subsisting prior to the issuance of said bonds, are not made parties to the proceedings?

We are of opinion that each one of these questions has been correctly decided by his Honor in his judgment in this case, and that they need no further discussion on our part. A reference to the authorities is sufficient. *Sanderlin v. Lukens,* 152 N. C., 738; *Newby v. Drainage Dist.,* 163 N. C., 24; *Shelton v. White,* 163 N. C., 90; *In re Big Cold Water D. D.,* 162 N. C., 127; *Banks v. Lane,* 170 N. C., 14; *Banks v. Lane,* 171 N. C., 505; *Comrs. v. Webb,* 160 N. C., 594.

The drainage law expressly provides for preliminary investigations, and for the employment and payment of engineers. Laws 1909, ch. 442, sec. 2; Laws 1911, ch. 67, sec. 1; Laws 1917, ch. 152.

It is provided expressly that "after the district shall have been established, and the board of drainage commissioners appointed, it shall be the duty of the board of drainage commissioners to refund to each of the petitioners the amount so paid by them as above provided, out of the first moneys which shall come into the hands of said board from the sale of bonds or otherwise, and the same shall be included in ascertaining the total cost of improvement.

The fact that when damages were assessed by the engineer and viewers under section 11, chapter 442, Act 1909, the plaintiff made no claim, and that no damages were assessed by way of compensation for the ditches and canals constructed by the plaintiff, does not estop the plaintiff from now presenting the claim for such compensation. The viewers themselves recommended in their final report that this work be availed of by the district, and that compensation therefor be made to the plaintiff. This final report of the viewers was confirmed by the court. It follows, necessarily, that if this recommendation was incorporated in the final report, and this final report was confirmed by the court, plaintiff's right to compensation for these ditches was determined by the court, and defendant's duty and authority to pay such compensation was decreed.

As declared by *Mr. Justice Hoke* in *Griffin v. Comrs.,* 169 N. C., 646: "This final report of the board of viewers is the controlling chart by which the drainage commissioners are to be guided in constructing the work and making out the assessment rolls under the law."

That the bonds, when issued, constituted a first and paramount lien on all the lands within the district, subject only to State and county taxes, has been held by this Court in *Banks v. Lane,* 170 N. C., 14; *Drainage Comrs. v. Farm Asso.,* 165 N. C., 697. *Fitzpatrick v. Botheras* (Iowa), 25 Ann. Cas., 534, notes p. 536; *Morey Eng. and C. Co. v. St. L. A. I. R. Co.,* 28 Ann. Cas., 1200, notes 1210.

Affirmed.

L. F. DAVIS v. LENOIR COUNTY ET AL.

(Filed 14 September, 1919.)

1. **Constitutional Law—Municipalities—Counties—Statutes—Public-Local Laws—Taxation—Bonds.**

   A public-local law authorizing the board of county commissioners to issue and sell bonds to construct and build public roads of that county is constitutional and valid.

2. **Constitutional Law—Taxation—Roads and Highways—Tax Necessary Expense.**

   Bonds issued by a county for constructing and building its public roads are for a necessary expense within the meaning of Art. VII, sec. 7, of the State Constitution.

3. **Same—Approval of Voters—Elections—Majority Vote Cast—Majority of Qualified Voters.**

   It is within the discretion of the Legislature to authorize a county to issue bonds for road purposes, either with or without the approval of its voters, or to require only the approval by a majority of the votes cast at a special election authorized for the purpose, and the approval by the majority of the qualified voters is not required for their validity.

4. **Constitutional Law—Roads and Highways—Necessary Expense—Taxation—Property and Polls—Equalization—Legislative Discretion.**

   It is not required for the validity of county bonds issued for road purposes that the tax to be levied should observe the equation between the property and the poll, and the objection is untenable that such tax is to be levied upon property alone, the object being for a necessary county expense.

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1919, of LENOIR.

This action was instituted by plaintiff on behalf of himself and others, taxpayers, against Lenoir County, the board of county commissioners, and the highway commission of said county, to restrain the issuance and sale of $2,000,000 of bonds, authorized by Public-Local Laws 1919, ch. 391, to construct and build the public roads of that county. The restraining order was dissolved by *Daniels, J.*, at the hearing, and the plaintiffs appealed.

J. Langhorne Barham and James H. Pou for plaintiffs.

Cowper, Whitaker & Allen, Dawson, Manning & Wallace, and J. S. Manning for defendants.

PER CURIAM. The plaintiff, Davis, suing on behalf of himself and others, citizens and taxpayers of Lenoir County, sought to enjoin the issuance of $2,000,000 of bonds authorized by chapter 391, Public-Local Laws 1919, ratified 6 March, 1919, and approved by a vote of the electors of the county at a special election held pursuant to the act. The temporary restraining order issued by *Judge Daniels* was made returnable before him, and heard 21 May, when he dissolved the restraining order, and denied the motion to continue the same.

The plaintiffs contend that the act was unconstitutional:

1. Because a special act of this nature was in violation of Art. II, sec. 29, of the Constitution. This point has been settled against the contention of plaintiff in *Martin County v. Bank, ante,* p. 26.

2. Because the Court held the construction and building of public roads are a necessary expense within the meaning of Art. VII, sec. 7, of the Constitution, but this has been so determined in *Herring v. Dixon,* 122 N. C., 420; *Tate v. Comrs., ib.,* 812; *R. R. v. Comrs.,* 148 N. C., 237; *Hargrave v. Comrs.,* 168 N. C., 626; *Moose v. Comrs.,* 172 N. C., 419; *Woodall v. Comrs.,* 176 N. C., at pp. 382-383.

3. The plaintiffs also contend that the bonds cannot be issued without having the approval of a majority of the qualified voters of the county, and this act was approved only by a majority of the votes cast. Being a necessary expense, it has been held that an approval of majority of the qualified voters is not required, but that in the discretion of the Legislature a majority of the votes cast shall be sufficient, as is provided in the statute (sec. 6), or the Legislature may authorize the bonds to be issued for such purpose without any vote at all. *Tate v. Comrs.,* 122 N. C., 812; *Wadsworth v. Concord,* 133 N. C., 587; *Burgin v. Smith,* 151

N. C., 561; *Comrs. v. Comrs.,* 165 N. C., 632; *Hargrave v. Comrs.,* 168 N. C., 626; *Swindell v. Belhaven,* 173 N. C., 1; *Woodall v. Highway Comrs.,* 176 N. C., 383.

4. Plaintiffs further contend that the statute is invalid because the tax is to be levied upon property alone, and the equation between property and polls is not observed. In *Moose v. Comrs,* 172 N. C., 431, the Court cited and reaffirmed *R. R. v. Mecklenburg,* 148 N. C., 220; *R. R. v. Buncombe, ib.,* 248, and *Perry v. Franklin, ib.,* 521, which held that, "The equation and limitation of taxation prescribed by Art. V, sec. 1, of the Constitution apply only to taxes for the ordinary expenses of the State and county government, and the levy of taxes for special purposes is committed by the Constitution to the discretion of the General Assembly, which may, as to such taxes, exceed the limitation, and may levy the tax on property alone, without observing the equation, subject to the qualification that if the tax is not for a necessary expense it must be submitted to a vote of the people," in which last case only it must be approved by a majority of the registered voters. *Wagstaff v. Highway Commission* (*Hoke, J.*), 177 N. C., 355. To same purport, *Jones v. Comrs.,* 107 N. C., 248; *Bennett v. Comrs.,* 173 N. C., 625.

Affirmed.

STATE v. W. B. WINDLEY.

(Filed 10 September, 1919.)

1. **Sheriffs—Indictment—Statutes—Taxes—Instructions—Appeal and Error.**

Where the defendant, a sheriff, is convicted under an indictment under Rev., 3408, for unlawfully, "willfully, and feloniously" failing to pay over moneys collected by him by virtue of his office, and by a second count, that he, in like manner, willfully and feloniously failed to pay them to the county treasurer and other parties lawfully entitled thereto, a verdict of the jury of guilty is construed as being guilty of the offense charged in the indictment, and the words "willfully and feloniously" may not be regarded as mere surplusage because of a charge by the court, in effect, that he would be guilty under the first count, under Rev., 3576, upon his own evidence, if believed, to the effect that he had failed to pay over to the proper persons all money he had received for them by virtue or color of his office, the offense under the former section being a felony, and under the latter a misdemeanor, and the instruction is held as reversible error.

2. **Indictment— Verdict— Instructions— Statutes— Juries— Poll— Questions for Jury—Trials.**

Where a sheriff is tried under an indictment under Rev., 3408, for unlawfully, willfully, and feloniously failing to pay moneys which he has collected by virtue of his office to the proper parties entitled, it is reversible error for the trial judge to poll the jury before verdict as to whether they believed the testimony of the defendant himself, stating he had proved himself a man of good character, and instructing them to find him guilty of the offense charged upon his own testimony, if believed, the presumption being that he was innocent of the offense, with the burden of proof upon the State to show guilt beyond a reasonable doubt, and the fact of his guilt being a question solely for the jury to determine.

INDICTMENT, tried at November Term, 1918, of BEAUFORT, when the defendant was convicted and appealed.

The charge in the indictment is that the defendant had unlawfully, willfully, and feloniously, as sheriff of Beaufort County, failed to pay over and deliver to the proper persons entitled to receive the same, when lawfully required to do so, certain money and funds which he had received by virtue or color of his office in trust, contrary to the provisions of the statute. The indictment was drawn under Rev., 3408, and this is stated in the brief of the State, which refers to the original statute, Code of 1883, sec. 1016, as having been amended, in consequence of the decision in *S. v. Connelly,* 104 N. C., 794, by Public Laws of 1891, ch. 241, and brought forward in the Revisal as sec. 3408.

There was evidence tending to show that the defendant had collected certain taxes, especially unlisted taxes, such as licenses and privilege taxes, and had failed to pay over the same to the officer designated by the law to receive them. The court instructed the jury that if they believed the defendant's testimony, which he gave in his own behalf, and found the facts to be as it tends to show them to be, it would be their duty to return a verdict of guilty on the first count, ignoring the count for embezzlement.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. A. Daniel, Jr., and Small, MacLean, Bragaw & Rodman for defendant.

WALKER, J., after stating the case: If we assume that the testimony of the defendant was of such a nature as to warrant the instruction to the jury, we are of the opinion that the court erred in further telling them, in answer to the question of one of the jurors, that they should convict the defendant if he simply received certain money and failed to pay it to the proper party, though he may have paid it to the county treasurer. The first part of section 3408 of the Revisal of 1905 relates to the embezzlement or willful and corrupt use or misapplication of funds held by any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable, religious, or educational institution, and denounces it as a felony, and that any such person convicted of the same shall be fined and imprisoned in the penitentiary for a time to be fixed by the court in the exercise of its discretion. The next provision of the section applies to the embezzlement, wrongful conversion, or corrupt use or misapplication to any purpose, other than that for which it is held, of any money, funds, securities, or other property, which such officer shall have received, by virtue, or color of his office, in trust for any person or corporation, and such act is declared to be a felony. The statute, as amended in the year 1891, is composed of this provision, and the last one in the section (amendment of 1891), which is as follows: "The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successor in office or other persons lawfully entitled to receive the same all such moneys, funds, and securities or property aforesaid. The punishment shall be imprisonment in the State's Prison or county jail, or fine, in the discretion of the court." The first part of the amendment refers to the embezzlement, conversion, etc., of money, funds, and other things held in trust for any person or corporation, and the second part to the failure or neglect of the officer to account for and deliver over to their successors in office, or to other persons who are lawfully entitled to receive the same, all *such* moneys, funds, etc., which means, by the use of the word "such," all the money or funds, etc., held in trust by such officers for any person or corporation. The Court held, in *S. v. Connelly,* 104 N. C., 794, that the statute, as then worded, applied only to the public officers, who are designated in the same, and to private persons who held money or property in trust for the public corporations named therein, and, therefore, that Connelly, as clerk of the Superior Court, who held funds belonging to a distributee, private person or corporation, was not indictable for failing to pay or deliver it to the person entitled thereto. At the next session of the Legislature after that case was decided, the statute was amended, as indicated above, so as to cover such a case. But the Legislature has not failed to provide very fully for the case presented in this record. Rev., 3576, is as follows: "If any State or county officer shall fail, neglect, or refuse to make, file, or publish any report, statement, or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office as he is by law required to do, he shall be guilty of a misdemeanor." The language of this section is very broad, and seems to include every case, where any officer named therein has failed to pay to the proper person, whoever he may be, all moneys received by virtue or color of his office. The offense is made a misdemeanor and punishable as such under the law. But it is suggested that the jury are presumed to have followed the judge's instruction that a verdict of guilty should be rendered by them, if they found only that defendant had received certain money, as taxes, and failed to pay it over to the proper party, and that such a verdict upon the only count in the indictment they were directed to consider, would mean no more, and would not be one for embezzlement, and that as the jury convicted under this instruction, the verdict should be taken as convicting only for the offense described in the charge; that this offense, though not a felony, but simply a misdemeanor, under Rev., 3576, is included in the general allegations of the count, and therefore the verdict should stand as one convicting defendant of the misdemeanor, and the punishment imposed accordingly, the words "willfully and feloniously" being regarded as mere surplusage. This would be dangerous practice, even if we admit the premises and the conclusion drawn from them. The defendant was convicted of the felony, and the jury so declared when they rendered the verdict, which means, when properly construed, guilty of the offense charged in the bill of indictment, which is a felony, because it is made so by the statute. The jury did not return as their verdict that he was guilty of the misdemeanor charged in the bill, even if such a verdict would be a legal and valid one, as to which we do not decide, it not being necessary that we should do so.

There is another consideration. As this verdict stands now, the defendant has been convicted of a felony, and if the verdict is permitted to stand, he will be deprived of his right to vote and to hold office, under Art. VI, secs. 2 and 8 of the Constitution, and the punishment may extend to confinement in the State Prison at hard labor. This but shows the great importance of a close scrutiny of the record to see if the defendant has been properly convicted of the felony charged in the bill, or whether, if guilty at all, his offense is only a misdemeanor. It is all too serious a charge for the record to be left in any state of uncertainty. The court thought that the defendant had been convicted of a felony, as it sentenced him to be imprisoned three years in the penitentiary.

But, leaving this matter here, we are of the opinion that, in any view, whether it be a felony or a misdemeanor, the learned judge went too far in his charge to the jury. We are fully aware that he did not intend to do so, but intended to confine his instructions to the jury within the proper limits. The language of the court addressed to the jury was, in our opinion, subversive of that freedom of thought and of action so very essential to a calm, fair, and impartial consideration of the case. The desire to see the law vindicated, and any violation of it receive the proper punishment, is a most commendable one, but we should not indulge it at the risk of taking from the defendant any of the constitutional or statutory safeguards. The slightest intimation of the court, by word or deed, as to what the verdict should be, may be fatal to any defendant, though he may be ever so innocent, and our statute provides against it. The jury should, at all times, be left free and untrammeled to find the facts. The judge declares the law arising upon the evidence, and the jury should be governed by his instructions, but they are the sole triers of the facts, subject to the right of the jury to say what evidence is competent and relevant, and what it tends to prove. What it does prove is the peculiar question for the jury to decide.

The present *Chief Justice* clearly stated the rule in *S. v. Riley,* 113 N. C., 648, when he said: "The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of the jury." As said by *Judge Henderson* and *Judge Hall,* in *Bank v. Pugh,* 8 N. C., at p. 206: "The manner in which the judge instructed the jury is, to me, also sufficient to warrant a new trial. He charged the jury that if they believed the testimony of Stephens, they should find the paper-writing not to be the deed of the defendant. Now what Mr. Stephens' testimony proved was a thing on which he could not decide: that belonged to the jury, who are the constitutional judges, not only of the truth of testimony, but of the conclusions of *fact* resulting therefrom." And by *Pearson, J.,* in *S. v. Shule,* 32 N. C., 154: "We think there was error in the mode of conducting the trial. There must be a *venire de novo.* There was a departure from the established mode of proceeding, and the wisest policy is to check innovation at once, particularly as in this case it concerns the trial by jury, which the bill of rights declares 'ought to remain sacred and inviolable.' . . . The innovation is that instead of permitting the jury to give their verdict, the court allows a verdict to be entered for them, such as it is to be presumed the court thinks they ought to render—and then they are asked if any of them disagree to it, thus making a verdict for them unless they are bold enough to stand out against a plain intimation of the opinion of the court." The same view of what is the proper mode of trial is thus stated by *Justice Connor,* in *S. v. Adams,* 138 N. C., 667: "It may well admit of question whether it be not more consonant with the genius of our law to permit the juries, under proper instruction of the court, to find the truth as they believe it to be, certainly in criminal cases, drawing such inferences and conclusions from admissions and facts proved to their satisfaction as experience, observation, and reason suggest."

The judge, in this case, did not enter the verdict and ask if any of the jurors disagreed to it, as was done in *S. v. Shule, supra,* but the jurors were, in effect, polled and asked if each of them believed the testimony of the defendant, and if so, to hold up his right hand. This was done after a statement by the court of what the defendant, as a witness in his own behalf, has said, and the further remark that he had proved himself to be a man of good character. The court then instructed the jury, that having all of them said that they believed the statement of defendant, he had told them before, and would tell them now, that it is their duty, as jurors, to take the law from the court, and if they believe defendant's testimony, and found the facts which it tends to show, to convict him. There are other expressions of like kind, though somewhat more intensive in form and emphasis. It may be that this defendant is guilty under the facts of violating the law as defined in the statute, but if so, the jury must be permitted to find the facts from the evidence freely and voluntarily, and this is true, no matter how plain a case against the defendant it may appear to be, as the plea of not guilty challenges the truth of the testimony, and "denies the credibility of the witnesses." The defendant was not given any benefit of the presumption of innocence, and no reference was made to it or to the doctrine of reasonable doubt. The burden of showing guilt is upon the State, as the contrary is presumed, and this requires that it should prove its case to the full satisfaction of the jury. It was said in *S. v. Simmons,* 143 N. C., 613, and approved in *S. v. Godwin,* 145 N. C., 461: "When the jury returned to the court, after having been out for a few minutes, the judge inquired of them as to their trouble in reaching a verdict, and they replied that some of them thought the defendant guilty and others thought he was not guilty; whereupon the judge polled the jury, asking each juror if he believed the evidence, when each replied that he did believe the evidence as given on the stand. This was not according to regular procedure or the approved precedents in such cases, if it was not a direct violation of the Act of 1796. . . . Besides, being in effect an intimation of opinion as to what the verdict should be, the inquiry of the judge and the manner of making it were calculated to deprive the jury of the freedom of thought and action which is so essential to an impartial consideration of the case and a proper discharge of their duty." See, also, *S. v. Green,* 134 N. C., 658; *Benton v. Toler,* 109 N. C., 238, and *McCanless v. Flinchum,* 98 N. C., 358, where the Court said: "Proof is the result or conclusion usually reached by evidence. If there was evidence upon the issues, the jury alone could determine and weigh its effect, and find the fact to be deduced from it." *S. v. Davis,* 15 N. C., 612 (op. of *Gaston J.*).

We do not think that the evidence was such as to admit of the instructions given by the court. The manner of instructing the jury violated the spirit, if not the letter, of our statute, Rev., 535 (Act of 1796, ch. 452). *Withers v. Lane,* 144 N. C., 184. It is not permissible to poll the jury before the verdict is announced, and it is done then to make sure of the verdict being that of the entire jury—the conclusion of all the jurors, *S. v. Sheets,* 89 N. C., 543, at 549, 550; Bish. Cr. Pro., sec. 830; *S. v. Young,* 77 N. C., 498; and that is the approved and usual practice.

S. v. Sheets, supra. We do not regard it as according to the established rule to poll the jurors, as to a special finding, and especially as to their belief regarding one particular fact, or the impression made upon their minds. It is better to follow the beaten way in such vital matters. There are other considerations not now necessary to be mentioned.

A learned presiding judge, in the course of a trial, may, and sometimes does, unwittingly, or inadvertently, so express himself as to influence the minds of the jurors, and this, of course, is done unconsciously and without due regard, at the time, to such injurious effect. We do not doubt that such was the case in this instance. The error, though, must be corrected, however unconsciously committed, for the harm is just the same, in kind and degree. The accused may be guilty of the crime alleged against him, but, in passing upon exceptions like those now taken, we must not forget, and should assume, that he may be innocent. We must conclude that the charge, especially when construed as a whole, was erroneous in the respect above indicated.

For the reasons stated, the defendant is entitled to a new trial. The solicitor will consider, in view of what we have said, whether it is prudent to make the indictment more conformable to the proof by adding another count, or by a fresh bill, but this is left entirely to his judgment.

We do not say that the defendant may not be convicted under the bill now before us, as it is not necessary to do so by anticipating further developments in the progress of the case. Our decision is strictly confined to what is presently before us, and does not go beyond it.

New trial.

STATE v. ASHLEY SOUTHERLAND.

(Filed 24 September, 1919.)

Indictments—Severance—Motions—Murder—Different Defenses—Conspiracy.

Upon a motion for a severance under an indictment charging two defendants with murder, the refusal of the trial judge is within his discretion, and not reviewable on appeal in the absence of its abuse, as, in this case, where the only grounds relied on for the motion are that the defense as to one would not apply to the other, and there was no charge of a conspiracy between the defendants to commit the murder charged against them.

APPEAL by prisoner from *Kerr, J.*, at April Term, 1919, of WAYNE.

The prisoner was indicted jointly with Mabel Howard for the murder of Millard L. Parker, the indictment being in the usual form. He was convicted of murder in the second degree and sentenced to ten years in the State's prison. From this sentence he appealed to this Court assigning only one error. Upon his arraignment he moved for severance on the grounds there would be no evidence offered tending to show the joint commission of the offense; that the defense of Mabel Howard would be that the defendant, Ashley Southerland, committed the offense, and that necessarily evidence would be admitted which, though competent against Mabel Howard, would not be competent against the defendant, Ashley Southerland. The court overruled this motion, and the defendant, Ashley Southerland, excepted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Kenneth C. Royal and J. L. Barham for prisoner.

CLARK, C. J. There is no exception to evidence or the charge. The sole assignment of error is the refusal of the motion to sever. From *S. v. Smith,* 24 N. C., 402 (1842), down to the present day, this Court has uniformly held that the granting of a severance when two or more are jointly indicted in the same bill rests in the sound discretion of the trial judge, and from his determination there is no appeal. *S. v. Smith,* 24 N. C., 402; *S. v. Collins,* 70 N. C., 241; *S. v. Underwood,* 77 N. C., 502; *S. v. Gooch,* 94 N. C., 987; *S. v. Oxendine,* 107 N. C., 783; *S. v. Finley,* 118 N. C., 1161; *S. v. Moore,* 120 N. C., 570; *S. v. Barrett,* 142 N. C., 565; *S. v. Carrawan,* 142 N. C., 575; *S. v. Holden,* 153 N. C., 606; *S. v. Millican,* 158 N. C., 617.

There are other cases, among them the very recent case of *S. v. Kirkland and Wilson,* 175 N. C., 771, which was a conviction of a secret assault with a deadly weapon with intent to kill. The defendants contended that much of the evidence in that case was competent against one defendant and not competent against the other, and that, "Although the court charged the jury that much of this was not evidence against Kirkland, or not evidence against Wilson, yet it had its weight with the jury, and the defendants seriously insist that the court should have ordered a severance so that the cases might be tried upon the proper testimony as against each defendant."

"It has been frequently held that a motion for a separate trial of defendants charged in the same bill of indictment is a matter that must necessarily be left to the sound discretion of the trial judge. To undertake to review such rulings is impracticable and would result in great delay in the disposition of criminal actions. It is only when there appears to have been an abuse of such discretion that this Court will entertain such exceptions and review the rulings of the trial judge.

Nothing of that nature appears in this record. *S. v. Dixon,* 78 N. C., 558; *S. v. Parrish,* 104 N. C., 689; *S. v. Hastings,* 86 N. C., 597; *S. v. Haney,* 19 N. C., 390; *S. v. Murphy,* 84 N. C., 742."

In *S. v. Finley,* 118 N. C., 1161, the facts as presented to the court on the motion for a severance are very similar to those in this case. The Court in that case (p. 1173) says: "The defendant alleged that the defenses of each of the accused were in antagonism as the foundation of the motion. An exception was filed, on the ground that the denial of the motion was a gross breach of discretion on the part of the court. Unless the accused suffered some apparent and palpable injustice in the trial below, this Court will not interfere with the decision of the court on the motion for a severance. Although the defenses were in conflict and involved the admission of testimony which was competent as against one of the defendants and not against the other, yet his Honor, with entire certainty and clearness, carefully instructed the jury in the application of the evidence, explaining to them, by a proper analysis of the same, what part of it was competent against both, and what part competent against one and not against the other, and guarding them against being influenced against either of the defendants by such evidence as he had instructed them was only competent against the other one. We therefore refuse to interfere with the ruling of the court below. The matter was in the sound discretion of his Honor, and from what appears, it is certain that there was no abuse of that discretion." *S. v. Oxendine,* 107 N. C., 783; *S. v. Gooch,* 94 N. C., 987.

In this case there are no exceptions to the charge, and therefore we must conclude that the court charged correctly, according to the ruling laid down in *S. v. Oxendine, supra.* Indeed, the prisoner's counsel states his exception that "The trial judge has no power to permit the defendant to be jointly tried for the commission of a single act where there is neither allegation or evidence tending in any way to show concerted action." There is neither precedent nor ground to sustain this proposition which would make every trial a separate one unless there is a charge of conspiracy. This indictment is in the statutory form and charges that "Ashley Southerland and Mabel Howard, on 20 December, 1919, with force and arms, at and in the county aforesaid, willfully, unlawfully, feloniously, and with malice aforethought, did kill and murder Millard L. Parker." Rev., 3245. This was held constitutional, *S. v. Moore,* 104 N. C., 743; *S. v. Brown,* 106 N. C., 645; *S. v. Arnold,* 107 N. C., 861. There is no requirement that in order to try two persons in the same indictment there must be a charge added of conspiracy, and the court cannot make such statute.

The judge is not a mere moderator, and it would detract very much from the efficiency and economy of the administration of justice if he were unnecessarily hampered with arbitrary rules as to matters which have always been committed to his sound discretion, such as the granting or refusal of continuances and of motions for severance, and the like, of which a learned and impartial trial judge on the spot is the best judge. He is selected for his fitness, and if there should be patent abuse he can be reviewed, which is full protection. There is no indication of such abuse in this case.

This murder occurred in a house of ill fame, where there were several persons present, but the evidence is that shots were fired by both these two persons, and nothing else appearing, it was decidedly to the public interest to investigate the whole transaction in one trial. Two trials would have taken double the expense and time. Cases have occurred where there being a severance, the party acquitted on the first trial has come into court on the trial of the other party, and sworn that he himself was the guilty party.

No error.

STATE v. W. L. SIMONS.

(Filed 24 September, 1919.)

1. **Intoxicating Liquors—Statutes—Possession—Evidence—Presumptions.**
   The statute, Laws 1913, ch. 44, sec. 2, makes the possession of more than one gallon of spirituous liquor at any one time, whether in one or more places, *prima facie* evidence of having it for the purpose of sale, and when such possession has been shown, a verdict of guilty will be sustained.

2. **Same—Intent—Subsequent Conditions.**
   Where there is evidence that the defendant, indicted under chapter 44, section 2, Laws 1913, had in his possession sufficient spirituous liquors to raise the *prima facie* presumption that it was for the purpose of sale, it is competent to show this intent, and in furtherance of the presumption, that soon thereafter, about two months, he was found working on a copper still on his premises, and had copper enough to make two of them; and that, upon his premises being searched, he had falsely denied the possession and had attempted to shoot the officer making the search. Cases where offenses are committed in sudden temper, under violent provocation or by the impulse of passion, distinguished.

APPEAL by defendant from *Kerr, J.*, at August Term, 1919, of PITT.

The defendant was convicted on a charge that he "Did unlawfully and willfully have in his possession illicit whiskey, three gallons, with the intent to sell, and did unlawfully and willfully receive at one time, and in one package, more than one quart of intoxicating liquor, contrary to law." Verdict and sentence. Appeal by defendant.

The evidence was that a constable, with a search warrant for whiskey, went to defendant's house; that he read the warrant to the defendant, who also read it. The defendant asked the officer to go in the house with him; they went through a narrow passage, to a back room, when the defendant reached up and grabbed his pistol from a shelf, but the officer was too quick for him, and presenting his own pistol, made the defendant put his down. The defendant then said that he did not have but one quart of whiskey, and he would be damned if any man was going to search his house or have it. The officer, however, did search his house. The defendant pulled out one quart from behind the bureau, and after some conversation he also handed out three gallons of corn whiskey. The other officer, who was with the constable, gave the same evidence. The defendant did not put on any testimony, and the above evidence was not contradicted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Albion Dunn for defendant.

CLARK, C. J. The statute, Laws 1913, ch. 44, sec. 2, makes "the possession of more than one gallon of spirituous liquors, at any one time, whether in one or more places, *prima facie* evidence of having it for the purpose of sale."

The defendant makes no exception to the charge, and therefore it is presumed that the judge charged in accordance with the law. The defendant put on no evidence whatever to contradict the testimony that he had three gallons and a quart, though he had denied having any, and he attempted to shoot the officer.

The sole exception is to the testimony of the sheriff that in August, 1919, he was at the defendant's house, and "found a new still almost completed, on which the defendant was working, and he had nearly enough copper for another one." The exception is upon the ground that, as the whiskey had been found in possession of the defendant on 2 June, this testimony was "irrelevant and incompetent." The evidence of the finding of the three gallons and a quart being uncontradicted, the jury found in accordance with the *prima facie* presumption, corroborated, as it was, by defendant's denial and his attempt to shoot. The evidence excepted to, at the most, was unnecessary, but not incompetent.

There are offenses which are committed in sudden temper, or under violent provocation, or by the impulse of passion. As to these, the only competent evidence is what took place at the time. *S. v. Norton*, 82 N. C., 630. But the crime of illicit dealing in intoxicating liquor is in the same class with larceny, counterfeiting, forgery, obtaining money under false pretenses, and burglary, which are all committed with deliberation, in defiance of law, and for the ignoble motive of making profit thereby. In all such cases it is competent to prove intent by showing matters of like nature, before or after the offense. If one is found in possession of counterfeit money it would be competent to show that in a reasonable time thereafter he was working on an apparatus for counterfeiting, or had passed other counterfeit notes, even though it should fix him with guilt of another offense. *S. v. Twitty,* 9 N. C., 248. And the same is true as to the counterfeiting coin. If the charge is forgery, evidence is competent that the defendant was found not long afterwards in possession of other forged notes, or had passed other forged notes, or was in possession of chemicals and other apparatus used for that purpose. 2 Whart. Cr. Law (11th ed.), sec. 920, note 7. Or if there was evidence that the defendant was found at night in a dwelling-house with burglary tools, the fact that he was found not long afterwards fashioning and shaping such tools would be competent evidence.

The question when evidence of other crimes is competent is discussed in *People v. Molineaux,* 168 N. Y., 264, which is reprinted with an admirable analytical table and very full notes (62 L. R. A., 193-357), which leaves nothing to be added. The subject is fully discussed in a line of decisions in this State. In *S. v. Murphy,* 84 N. C., 742, it is held: "Evidence of a 'collateral offense,' of the same character and connected with that charged in an indictment, and tending to prove the *guilty knowledge* of the defendant, when that is an essential element of the crime, is admissible." This is a very clear discussion by *Judge Ashe* as to the instances in which such evidence is competent to show the *quo animo,* intent, design, guilty knowledge, and *scienter.* That case has been cited in many cases with approval, among them the following:

In *S. v. Parish,* 104 N. C., 692: "The rule is that testimony as to other similar offenses may be admissible as evidence to establish a particular charge where the intent is the essence of the offense, and such testimony tends to show the intent or guilty knowledge, *S. v. Murphy,* 84 N. C., 742." In *S. v. Weaver, ib.,* 761, it is said: "This Court has gone further, and allowed evidence of a different offense of the same character and not connected with that charged in the indictment, in order to show guilty knowledge where the intent is of the essence of that charge," citing the above cases. In *S. v. Walton,* 114 N. C., 783, *McRae, J.,* says: "In the trial of an indictment for obtaining money under false pretense it is competent, in order to show the *scienter* and intent, to prove other similar transactions by the defendant."

In *S. v. Graham,* 121 N. C., 623, it is held that when the evidence tends to prove guilty knowledge of the defendant, the *quo animo,* the intent or design, evidence of other acts of the defendant are competent, as, for instance, passing counterfeit money of like kind; sending a threatening letter, and the like. In the latter case it is said: "Prior and subsequent letters to the same purpose are competent in order to show the intent and meaning of the particular letter in question." In *S. v. Adams,* 138 N. C., 693, *Walker, J.,* says: "True it is that evidence as to one offense is not admissible against a defendant to prove that he is also guilty of another and distinct crime, the two having no relation to or connection with each other. But there are well defined exceptions to this rule. Proof of another offense is competent to show identity, intent, or *scienter,* and for other purposes," citing *S. v. Murphy, supra.* The same is stated by *Connor, J.,* in *Johnson v. R. R.,* 140 N. C., 586.

In *S. v. Leak,* 156 N. C., 646, *Allen, J.,* says: "It was competent for the State to prove that the defendant placed his hands on the prosecutrix at another time on the day of the assault, as evidence of another assault of which the defendant could have been convicted under the indictment, and as tending to prove the *animus* and intent of the defendant," citing *S. v. Murphy, S. v. Parish,* and *S. v. Adams, supra.* In the very late case, *Gray v. Cartwright,* 174 N. C., 49, *Walker, J.,* held: "In an action to recover damages for malicious prosecution of a criminal action for the larceny of a cow, evidence is competent to show that the defendant in the criminal action, and the plaintiff in the civil one, had taken, at other times, cattle to his premises, under similar circumstances, when relevant to his criminal intent in the matter under consideration in the present action." *S. v. Murphy,* 84 N. C., 742; *S. v. Walton,* 114 N. C., 783, being cited and approved.

In *S. v. Bush,* 177 N. C., 551, the Court, speaking of the illicit sale of whiskey or possession of it for purposes of sale, said that like the crime of larceny, it is "generally done furtively, and direct evidence is not easily had. It is usually an inference to be drawn by the jury from a combination of circumstances." The evidence in this case of the denial by the defendant of possession, his attempt to shoot the officer, and his being found later making a still are all competent in support of the presumption, raised by his possession of liquor, that he had the liquor in his possession for the illicit purpose of sale.

If a person had liquor in his possession for the purposes of sale he is guilty whether he makes a sale or not. *S. v. Davis,* 168 N. C., 144.

No error.

STATE v. GARLAND STANCILL.

(Filed 24 September, 1919.)

1. **Criminal Law—Conspiracy—Common Design—Evidence—Trials.**

Where there is evidence tending to show that the several defendants formed and entered into a common design to commit a theft, the substance of the offense charged in the bill of indictment, the acts and declarations of each in pursuance and in furtherance thereof are competent as to all.

2. **Appeal and Error—Instructions—Presumptions—Evidence.**

Where the instructions of the court are not set out in the record on appeal to the Supreme Court, it will be presumed that they were correctly given, in explanation of the relevancy and competency of the evidence excepted to, and as to the circumstances under which the jury could consider and apply it and to what extent it could be so considered and applied.

3. **Criminal Law—Conspiracy—Common Design—Declarations.**

Where the declarations of one of the defendants as to the theft, for which several were indicted, are incompetent as to another of them, their admission is cured when the one charged with making them afterwards testified that he had done so, it being immaterial to whom he had made them, the fact alone being important, and the order in which the evidence is introduced being within the discretion of the trial judge, when not plainly abused by him.

4. **Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.**

Objection to the admissibility of evidence should be taken before the witness has answered the question for the exception thereto to be available on appeal, unless the objection, which comes too late, is allowed by the judge in the exercise of his discretion.

5. **Appeal and Error—Prejudice—Harmless Error—New Trials.**

Error must be prejudicial to the appellant for reversible error to be held on appeal.

6. **Indictment—Larceny—Conspiracy—Common Design—Evidence.**

When the indictment is for conspiracy of several defendants to steal from a person specified therein, evidence of theft by the several defendants from a certain other person, not named in the indictment, is competent, when there is evidence that it was a part of a series of transactions in pursuance of an original design, or conspiracy, and sufficiently connected with the main charge to show the defendant's intent or a common purpose.

7. **Evidence—Corroborative—Rebuttal—Substantive—Conspiracy.**

Testimony may be competent in corroboration of another witness though incompetent as substantive evidence, and where a defendant, indicted for larceny of tobacco, has testified he was unfamiliar with the neighborhood in which it had been committed, and relied upon the assurance of his codefendant that the latter had taken it from the house of his uncle, with his consent, evidence in rebuttal of this statement is properly admitted.

INDICTMENT, tried before *Daniels, J.*, and a jury, at January Term, 1919, of PITT.

The appellant, Garland Stancill, was jointly indicted with Ernest Perry and Raymond Stancill for the larceny of a lot of leaf tobacco of the value of $250, property of J. H. Little and others, and for receiving the same knowing it to have been stolen.

The appellant, Garland Stancill, was jointly indicted with Ernest Perry and Raymond Stancill for the larceny of a lot of leaf tobacco of the value of $250, property of J. H. Little and others, and for receiving the same, knowing it to have been stolen.

The evidence for the State tended to show that on Friday night, 25 October, 1918, the defendants, Ernest Perry and Garland Stancill, took and carried away from the packhouse of J. H. Little 49 sticks of tobacco, the property of J. H. Little. They were driving the car of Raymond Stancill and carried the tobacco, thus stolen, to the home of Raymond Stancill, where it was received by said Raymond. The testimony of the defendant's witnesses tended to show that both Garland and Raymond Stancill were not guilty. Both of them admitted the fact that Little's tobacco was carried to Raymond Stancill's house by Perry and Garland Stancill, but both disclaim guilty knowledge.

Garland Stancill testified as follows:

"That he went with Perry, but had never been in that territory before, and Perry told him that he was going to his Uncle Bob Parker's after the tobacco; that Perry got out of the car and went up to the house, which he told witness was his uncle's house, came back and stated to the witness that his uncle said go ahead and get the tobacco; that the witness had no idea that Perry was not telling the truth, and did not know that the tobacco was not Perry's tobacco."

At the trial Ernest Perry submitted to a verdict of guilty, and Raymond Stancill was acquitted, while Garland Stancill was convicted. From the judgment upon such conviction, Garland Stancill appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Albion Dunn for defendant.

WALKER, J., after stating the case: It will be perceived from the foregoing statement that the issue in the case, and it was clear-cut and sharply drawn by the contentions of both the Stancills, was, Did the Stancills know that Ernest Perry had stolen the tobacco? The errors assigned by the defendant relate to the competency of testimony. It appears that the three defendants were jointly indicted for stealing tobacco from J. F. Harris and others, and the evidence tends to show that they had formed a conspiracy to commit the theft, and this was the substance of the offense, as shown by the bill and the testimony. They had combined together, at least two of them—and there was evidence against the third, who was finally acquitted—to do an unlawful act, that is, to steal from the prosecutors. The acts and declarations of those who were parties to the common design, in furtherance of the conspiracy, were competent. *S. v. Anderson,* 92 N. C., 732; *S. v. Brady,* 107 N. C., 822. As the charge is not in the record, it must be presumed that the jury were correctly instructed, as to the competency and relevancy of such evidence, and as to the circumstances under which it could be used by them, and as to what extent it could be considered.

The testimony of Ed. Marks as to what the defendant, Ernest Perry, had said to him about the stealing of the tobacco by Garland Stancill and himself was, standing by itself, an unsworn declaration of Ernest, incompetent against Garland, but he afterwards took the stand himself as a witness and testified to the same facts. If the statement by him was technically incompetent, at the time of its introduction, and we will admit that it was so, the error was cured when Ernest Perry testified, substantially at least, to the same thing. *Albert v. Ins. Co.,* 122 N. C., 92; *Strother v. R. R.,* 123 N. C., 197; *Beaman v. Ward,* 132 N. C., 68; *Summerlin v. R. R.,* 133 N. C., 550; *Turner v. Comrs.,* 127 N. C., 153, or, in any view, it was harmless error. See cases above. It was immaterial whether he made the statement to Ed. Marks or to any other person; the important fact was, whether he made it at all. That he made it was merely corroborative of his own testimony, and if defendant desired it to be confined to that single purpose, he should have asked the judge to do so. But, as we have said, it is but harmless, when considered with the testimony of Ernest Perry. *Rawls v. White,* 127 N. C., 17. We do not reverse for error which does no harm, and is free from prejudice. The statement came first, before Ernest Perry testified, but the order of the testimony is regulated by the discretion of the judge, and, when there is no clear and gross abuse of it, we will not interfere. *Worth v. Ferguson,* 122 N. C., 381. It may be that the court admitted this testimony at the time it appears to have come into the case, in anticipation of similar and sworn testimony of Ernest Perry when he took the stand as a State's witness, and as corroborative of it. Besides, it appears that the objection was not offered until the question was answered. This was too late. *Beaman v. Ward,* 132 N. C., 68; *Dobson v. R. R.,* 132 N. C., 900. But, as already shown by the authorities, slight error, where there is no prejudice, works no harm, and does not justify a reversal. *Griffin v. R. R.,* 138 N. C., 55; *West v. Grocery Co., ib.,* 166.

The testimony as to the theft of the Wilkinson tobacco was offered merely to show the intent with which the defendants stole this tobacco, and not to prove the accusation substantively. It was sufficiently connected with the main charge to render it competent for this purpose. It was all taken to Raymond Stancill's, the common storehouse for the loot of these defendants. It was but a part of a series of transactions carried out in pursuance of the original design, and it was contemplated by them in the beginning, that they should plunder the tobacco barns in the neighborhood, and this was one of them. The jury might well have inferred this common purpose from the evidence. Robbing Wilkinson was a part of the common design, and done in furtherance of it. Proof of the commission of other like offenses to show the *scienter*, intent, or motive is generally competent when the crimes are so connected or associated that this evidence will throw light upon that question. In Wharton's Cr. Ev. (10th ed.), p. 60, such testimony is thus classified: "First. As part of the *res gestæ*. *S. v. Freeman*, 49 N. C., 5; *S. v. Murphy*, 84 N. C., 742; *S. v. Thompson*, 97 N. C., 496; *S. v. Mace*, 118 N. C., 1244; *S. v. Adams*, 138 N. C., 688. Second. To prove identity of person or crime. *S. v. Thompson, supra*; *S. v. Weaver*, 104 N. C., 758. Third. To prove guilty knowledge. *S. v. Twitty*, 9 N. C., 248; *S. v. Walton*, 114 N. C., 783; *S. v. Hight*, 150 N. C., 817; *Ins. Co. v. Knight*, 160 N. C., 592. Fourth. To prove intent. *S. v. Weaver*, 104 N. C., 758. Fifth. To prove motive. *S. v. Plyler*, 153 N. C., 630. Sixth. To prove system. *S. v. Wilkerson*, 98 N. C., 696; *S. v. Winner*, 153 N. C., 602. Seventh. To prove malice. Eighth. To rebutt special defenses." We think that several of these classes embrace the objections made here, and that the latter are answered by the law as there stated by Wharton. It is said in *S. v. Murphy*, 84 N. C., 742: "Evidence of a 'collateral offense' of the same character and connected with that charged in an indictment, and tending to prove the guilty knowledge of the defendant, when that is an essential element of the crime, is admissible; therefore, on the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property as his in an inclosure of the defendant, and demanded its delivery to him, it was held competent for the State to prove by the testimony of another witness that, at the same time and place and in the presence of the prosecutor and defendant, such witness said that the other hog therein was his, and he then and there claimed and demanded it of defendant." In that case, the Court says, in an opinion by *Justice Ashe*, who always wrote clearly, accurately, and vigorously, and reviews the law at length: "Where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment," citing and approving *Yarborough v. State,* 41 Ala., 405; *Thorp v. State,* 15 Ala., 749. The whole question is considered, and fully reviewed, in *Gray v. Cartwright,* 174 N. C., 49, where the authorities are collected. This question is fully discussed by the *Chief Justice* in *S. v. Simons,* at this term, and evidence of the kind admitted in this case is held there to be competent to show knowledge, intent, and motive.

The testimony of Oscar Bryant was competent as corroborative of the witness Henry Crowell. It was also competent as rebutting Garland Stancill's special defense, that he was not familiar with that neighborhood, and that he was deceived by Perry as to the latter's purpose in going to "his Uncle Bob Parker's house."

It may be said generally that the objections to testimony were taken after the questions had been answered. This is not the proper course, and the reason is that it gives the objector two chances, if the answer proves to be favorable to him, he would not need an objection, but if unfavorable he would. He can be silent if he likes it, or object when he finds that he does not. He should object to the question, and then, if the answer is not responsive, and contains unfavorable new matter, he can move to strike it out. *Beaman v. Ward, supra; Dobson v. R. R., supra.*

The prisoner was ably defended, but with all the light shed upon the case at the trial below, and in this Court, we deem the criticisms of counsel in regard to the rulings of the court to be unsound.

We can discover no tenable ground for reversal.

No error.

STATE v. HAYES BALDWIN.

(Filed 8 October, 1919.)

1. Courts—Opinion upon Facts—Criminal Law—Sentence.

Where a large quantity of spirituous liquor was found in the possession of two persons, separately indicted under the statute making such possession evidence that it was for the unlawful purpose of sale, a remark of the judge in sentencing one of them, upon his conviction, that he thought both persons accused had been selling and delivering the liquor at a certain town, is not in the contemplation or meaning of Rev., 535, prohibiting the judge from giving an opinion whether a fact is fully or sufficiently proven, on the trial of the other defendant.

2. Same—Common Law—Strict Construction.

The restriction on the trial judge that he shall not express his opinion as to whether a fact at issue had been fully or sufficiently proven does not exist at common law, but rests upon statute, Rev., 535, and being in derogation of the common law, the statute cannot be extended beyond the meaning of its terms.

3. **Jurors—Discharge—Statutes—Courts—Terms—Improper Remarks—Presumptions.**

Under the statute, the jury, for one week of a term of court, are discharged, and do not try the cases of the following week thereof; and the remarks of the judge in sentencing a prisoner during the former week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week.

4. **Appeal and Error—Courts—Continuance of Case—Discretion—Abuse.**

The continuance of a case, on motion, is within the sound discretion of the trial judge, and is not subject to review, in the absence of abuse, which is not shown by the fact that he tried the case of a defendant the following week of the same term at which another had been convicted of participating in the same criminal offense.

5. **Spirituous Liquor—Evidence—Circumstance—Instructions.**

The defendant, tried for violating the prohibition laws of the State, was seen carrying the liquor to the premises of his brother, and ran away before he could be taken. As the officers were loading an automobile with the liquor, he suddenly appeared and ran away with the key of the machine to prevent them from carrying it away. *Held*, with the other evidence in this case tending to show his guilt, it was not error for the trial judge to state, in giving the contentions of the parties, that the State relied upon this as a circumstance tending to show guilt, and the same would have been proper as an instruction.

APPEAL by defendant from *Allen, J.*, at March Term, 1919, of WAKE.

The defendant was convicted of having in his possession spirituous liquors for the purpose of sale. The evidence showed that on the night of 18 December, 1918, he drove up in an automobile to the house of his brother, Joe Baldwin, near Apex (who was also convicted at the same term of the same offense); at the yard gate he took out of the machine four jugs nearly full of whiskey, one of them being a three-gallon jug. He was arrested by the officers just as he put down inside the yard the last of these jugs. One of the officers went inside the house, leaving the defendant in charge of the other. The defendant thereupon made his escape. In the back yard of the house seven 5-gallon kegs of corn whiskey were found in the chicken house.

The officers intending to use the defendant's car to transport the liquor to Apex, backed it up to the gate and commenced loading the whiskey on it, when the defendant suddenly made his appearance and took the key out of the car, thus preventing it being used, and again made his escape. When the officers arrived at the house of Joe Baldwin it was lighted up, and when officer Raines went inside he found the wife of Hayes Baldwin playing the piano and a little negro boy ran out of the house. There were in the house also two white people, two men and two women, who refused at first to give their names.

Upon this evidence the jury found the defendant guilty and he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Armistead Jones & Son and Percy J. Olive for defendant.

CLARK, C. J. The exception chiefly relied on, it seems, was that the week before the judge, in sentencing Joe Baldwin (see *S. v. Baldwin, post,* 693), remarked that in his opinion Joe and Hayes Baldwin were not selling liquor to the people of Apex, but were delivering it to people in Wilson. This was in connection with the fact that the Wilson people found in the house who had been subpœnaed as witnesses had failed to attend.

The trial of the defendant Hayes Baldwin did not take place till the next week, and it does not appear in the record that a single juror on the trial of the present defendant was present when Joe Baldwin was sentenced the previous week. Indeed, Rev., 1959, required that the panel for the first week (when these remarks were made), should be discharged at the end of that week, and there is no probability that any juror who tried this defendant on Thursday of the following week knew of the judge's expression as to the Wilson people on Friday of the week before. Nor could his remarks be considered as an expression of an opinion in the trial of this defendant the following week any more than the verdict of guilty against Joe Baldwin on whom he was passing sentence.

At common law, and in England to this day, the judge is not forbidden to express an opinion upon the facts of any case, but it was deemed that the judge, who is an integral part of the trial, could be of aid to the jury in expressing an opinion upon the reasonable inferences to be drawn from the evidence, though of course he could not direct a verdict when there was conflicting evidence. The same rule still obtains in all the Federal Courts, and the courts of nearly every State of the Union. It is, therefore, not an inherent right of a defendant that the judge should be restricted from expressing any opinion during a trial. The North Carolina statute being a restriction upon the almost universal rule, cannot be extended beyond its terms, which are as follows: "Rev., 535. No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising therefrom."

This restriction therefore forbids the judge only "in giving a charge to the petit jury," and from "giving an opinion whether a fact is fully or sufficiently proven." Being in derogation of the common law, and of the practice and procedure in the English and Federal Courts, and of the procedure generally elsewhere, we cannot extend it beyond its terms.

In *S. v. Jacobs,* 106 N. C., 695, where the judge remarked, just before the trial began, that the jailer had informed him that the prisoner "would escape if he had opportunity," this was held not an expression of opinion forbidden by our statute. It was not given "in a charge to the jury," nor was it an expression of "opinion whether a fact was fully or sufficiently proven."

The Court said: "At common law, though the judge, as is still the rule, could not direct a verdict in any criminal case, nor in a civil case, when there was a conflict of evidence, there was no inhibition upon his expressing an opinion upon the facts." It was thought that such expression of opinion, while not governing the jury, would be of assistance to them, coming from an impartial man of much experience in weighing evidence and in drawing conclusions therefrom. Such is still the practice in England and her Colonies, in our Federal Courts, and, indeed, in most of the States of the Union. In North Carolina, in 1796, the following statute was passed, which changed the practice in this respect: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact was fully or sufficiently proven, such matter being the true office and province of the jury." The Court added: "It is difficult to see how the remark of the judge violated any provision of this statute. No juror had been selected, the remark was not in the presence of the jury, nor did it contain any opinion that a fact was fully or sufficiently proven. No facts had been shown in evidence. Indeed, had the jury been empaneled, the statute prohibited the judge 'from expressing an opinion only upon those facts respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, imputed liability of the defendant depends.' *Ruffin, C. J.*, in *S. v. Angel,* 29 N. C., 27. To the same purport, *DeBerry v. R. R.*, 100 N. C., 310; *S. v. Jones,* 67 N. C., 285; *S. v. Robertson,* 86 N. C., 628, and *S. v. Laxton,* 78 N. C., 564. In the latter case, in which the prisoner was convicted of rape, *Smith, C. J.*, says: 'It is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion in connection with and constituting a part of the instructions by which the jury were to be governed, and when its influence on their minds would be direct and effective.' "

After making the above citations, the Court, in *S. v. Jacobs,* said further: "Our juries are usually men of intelligence, competent to understand the evidence and draw their own conclusions as to the facts. To construe every remark incidentally made by the judge, in ruling upon debated questions arising on the trial or otherwise, to have such weight upon the mind of the jury as to bias the freedom of their verdict, is as little complimentary to the intelligence and sturdy independence of those who compose our juries as it is to the impartiality of those who are called upon to preside over our Superior and Criminal Courts."

In *S. v. Jacobs, supra,* the remark was made just before the trial began, but the jury had not been empaneled; the remark was not in a charge to the jury; nor was it an expression of opinion whether "A fact was fully or sufficiently proven," for no facts had been shown in evidence, and hence it was held that it was not a violation of our statute restricting the judge as to such matters. There the men who were subsequently on the jury were doubtless present in the court room at the time when the remark was made. In the present case the remark objected to was made six days previously in passing sentence upon a defendant in another case, and there is no evidence that any one was present who subsequently served on this jury, and the presumption is that there was not, for the previous jury had been discharged by operation of law at the end of the previous week.

In *S. v. Angel,* 29 N. C., 27, quoted *supra,* the prisoner was convicted of murder and the remark of the judge excepted to was made in the charge to the jury, *Ruffin, C. J.,* said in that case that the act of the Assembly restraining the judges from expressing to the jury an opinion as to the facts of the case applied "only to those facts respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends." This has been cited often since, among other cases, in *S. v. Howard,* 129 N. C., 661, and in the very recent cases of *S. v. Rogers,* 168 N. C., 116, and *Long v. Byrd,* 169 N. C., 659.

Among the cases citing *S. v. Jacobs,* 106 N. C., 696 (besides those already quoted), are *S. v. Crane,* 110 N. C., 535, where the Court says: "The jury is an essential part of the judicial system among every English-speaking people, and while not perfect, the experience of the ages and the observation of the present are that it performs fairly well its part. Certainly no better substitute has ever been found. To underrate the intelligence of twelve honest, impartial men, who try the issues of fact submitted to them, is a mistake. When aided by a just and intelligent judge, their verdicts are generally correct. Jurors are not expected to possess legal training. Their province is not to pass on questions of law, but their grasp of the facts is usually just and accurate, and probably no court passes that upon the jury there are not men of equal mental capacity with the judge who presides, or the counsel who address them. Jurors are not in their nonage, and it is not just to underrate their intelligence. This Court has heretofore said as much in *S. v. Jacobs,* 106 N. C., 695." The Court, in that case (*S. v. Crane*), was remarking upon the exception that though the judge had withdrawn evidence from the jury, it would still be affected by it.

In *S. v. Jackson,* 112 N. C., 853, where the exception was that during the argument of a motion for continuance of a case in the presence, but prior to the empaneling of a jury, a bystander had remarked in open court that the prisoner's wife had said she would not come to a trial because she would only help get her husband in jail, it was held that it was not ground for exception; that the judge did not grant a continuance therefor, saying: "If such remarks were ground for new trial, all men present who might possibly become jurors would need be sent out of the courthouse on the argument of preliminary motions. Remarks made by the judge on such motions do not come within the prohibition of the statute, *S. v. Jacobs,* 106 N. C., 695, and cases there cited. . . . There is a presumption of law that jurors are men of sufficient intelligence to understand that their verdicts must be based solely upon the evidence adduced on the trial, and the law laid down by the court."

In this present case, the remark of the judge in sentencing another party tried for committing the same offense does not appear to have been heard by any juror who sat in this case, and if it had been, the jury would be presumed conclusively to have tried the case, according to their oaths, upon the evidence submitted to them.

The exception to the refusal of a continuance of the case of Hayes Baldwin because the same judge had tried Joe Baldwin the previous week has no foundation in precedent nor logically for the facts are found by the jury only. 25 Cyc., 582, 583.

The granting or refusal of a continuance like the granting or refusing of a severance, or the separation of witnesses, and like matters, has always been wisely and properly left to the sound discretion of the presiding judge, and not reviewable except in cases of patent abuse, which does not appear here. As was said in *S. v. Southerland,* at this term: "The judge is not a mere moderator, and it would detract very much from the efficiency and the economy of the administration of justice if he were unnecessarily hampered with arbitrary rules as to matters which have always been committed to his sound discretion."

The defendant also excepts that the court stated as a contention of the State that the jury had a right to consider as a circumstance that when the officers were proceeding to take the whiskey and carry it off the defendant, who had escaped, came back on the scene and locked the car and again escaped. This was stated as a contention, but it would not have been error if the court had told the jury that it was a circumstance which they could consider in connection with the other evidence offered by the State in connection with having the liquor in his possession, whether it was for an unlawful purpose.

There were numerous other exceptions, but after a careful and full consideration of them, we are of opinion they require no discussion.

No error.

STATE v. JOE BALDWIN.

(Filed 8 October, 1919.)

1. Spirituous Liquor—Possession—Evidence—Appeal and Error—Harmless Error.

Where the evidence of defendant's possession of spirituous liquors is sufficient to make out a *prima facie* case that it was for the purpose of sale, testimony of those who were found on the premises at the time of the search, in reply to the officer's questions, as to why and for what purposes they were there, that they knew nothing of the liquor, and were only stopping en route to another place to have their automobile repaired, as it appeared to be harmless, if erroneous, and of it the defendant cannot complain, certainly if he afterwards derived a benefit therefrom.

2. Spirituous Liquors—Possession—Evidence—Nonsuit.

Testimony of the officers making the search of the premises of defendant, who was indicted for having in his possession spirituous liquor for the purpose of sale in violation of the statute, that certain sufficient quantities thereof were found in different places thereon, in jugs and kegs, etc.; that corks, bottle-wrappers, and a suitable glass for retailing it were found, together with a keg having a lock faucet, the key of which was in defendant's possession; and of the conduct of the defendant, etc., is *Held*, in this case, competent to show the unlawful intent of the defendant to sell, and his unlawful purpose in having the liquor on his premises, and the defendant's motion as of nonsuit was properly denied.

3. Instructions—Prayers for Instruction—General Charge—Trials.

The refusal of the prayers for instruction aptly tendered by appellant is no ground of error on appeal if such have been substantially covered by the judge, in his charge to the jury, in his own language.

4. Instructions—Appeal and Error—Error Cured.

Where the defendant is tried under the statute which makes the possession of more than one gallon of spirituous liquor evidence that it was for the purpose of sale, and the trial judge has erroneously instructed the jury that the law "presumed" from the bare fact of such possession an intent or purpose to sell, this error is cured when he immediately corrects it by charging the correct rule as to the *prima facie* case, presumption of innocence, reasonable doubt, and burden of proof, so that the jury were not mislead. *S. v. Bean*, 175 N. C., 748, and other like cases, approved.

5. Trials—Instructions—Contentions—Statement by Solicitor—Exceptions—Appeal and Error.

Exception taken after verdict to the restatement by the solicitor, in a criminal case, of his contentions, allowed by the court while the court was recapitulating the contentions on both sides, is too late; for if the solicitor had misstated them, the attention of the judge should have been called to it at the time.

6. Spirituous Liquor—Possession—Evidence—Principal and Agent.

With the other evidence in this case as to the defendant having sufficient spirituous liquor in his possession and on his premises to make a *prima facie* case under statute of the unlawful purpose of sale, testimony of the acts of his brother in carrying such liquor from an automobile to defendant's premises, under the surrounding circumstances, is held to be competent as to his agency for the defendant in so doing.

INDICTMENT, tried before *Allen, J.*, and a jury, at March Term, 1919, of WAKE.

Defendant was tried under an indictment containing four counts for:

1. Having sold whiskey to parties unknown.
2. Having whiskey in his possession for the purpose of sale.
3. Having received more than one quart in one package at one time.
4. Having received more than a quart within fifteen days.

There was a verdict of guilty, and from the judgment upon such conviction, the defendant appealed to this Court. The judge, however, confined the jury's consideration to whether defendant had intoxicating liquors in his possession for the purpose of sale.

There was testimony which tended to show that three officers of Wake County, Raines, Honeycutt, and Broadwell, in consequence of information which they had received, went to Apex on the evening of 18 December, 1918, and about 8 o'clock that evening stationed themselves in a plum thicket near defendant's house, which was situated just outside of the limits of that town by the Seaboard Air Line Railroad. While they were there, an automobile came up, the driver putting out the lights when he was approaching the house, ran up in front of defendant's driveway, which led into his back lot, and stopped. When the officers had arrived within about fifty yards of the car, they could see a man going to and coming from it, the moon at the time shining brightly. They arrested this man as he put down the last jug inside the gate of defendant. The man himself was Hayes Baldwin, a brother of defendant, and there were four jugs, two of two gallons, one of three gallons, and one of one gallon, each jug in a guano sack. One of the officers stated that they contained monkey rum and the other corn whiskey. Officer Raines, sending Broadwell to the front door of defendant's house, went himself to the back door. The house was lighted, and he, going inside, found two white boys and two white women, as well as the wife of Hayes Baldwin, but did not find Joe Baldwin or his wife therein. He found one quart of whiskey outside of the back door on a little shelf. Officer Honeycutt, while Raines was in the house, went to the back door with

Hayes Baldwin in charge, and while there a little negro boy ran out. This attracted his attention, and, while watching the boy, Hayes made his escape. He found in the yard a broken-down automobile and a box that had a half-gallon of cork stoppers in it. By the garage was a small chicken-house, and Honeycutt, throwing his searchlight in it, found seven five-gallon kegs of corn whiskey. This they deposited with the four jugs at the gate. After the search, the officers, intending to use the automobile in which Hayes Baldwin had driven up to carry the liquor which they had found, were engaged in putting the liquor in the machine, when Hayes Baldwin, suddenly appearing, locked the machine so that they could not use it, and again made his escape. It seems that the white people in Joe Baldwin's house were residents of the town of Wilson, and were on their way home when they stopped there. The white man claimed that his machine had broken down, and that they stopped for the purpose of having it repaired. The officers, however, used his machine in carrying the liquor to Apex. The defendant was arrested on Friday afternoon, 20 December, about seventy-five yards from his home. He was left in the custody of the local deputy, Wall, on that occasion, and while the other officers went to search another house he made his escape. On the afternoon of the 20th they found, on defendant's premises, two five-gallon kegs of wine, one of which was set up in a corner of his garage with two glasses near it. This had a faucet, which could be used only with a key. In this garage, too, they found a large number of wrappers for bottles, "the kind that are usually seen around them." They were pasteboards in the shape of pint bottles.

The officer, Roy Honeycutt, testified as to the search on 20 December, as follows:

"I found a five-gallon jug about half full of scuppernong wine, and a fifteen-gallon keg of bullis wine, which was on the shelf in the garage, and a glass the size of that; one of them had a faucet that you could lock, and the lock was in the possession of Joe's wife, and that was put up there from the time we went there Wednesday night until Friday."

Defendant objected to this evidence, but it was admitted. This was defendant's second exception. His first exception was to the refusal of the court to permit an officer, who was a witness, to answer a question asked him on the cross-examination: "Did Mr. Harrison, the white man, tell you why he was at Joe Baldwin's house?" But testimony to this effect was afterwards admitted, without objection, and this is what they said to officer Honeycutt: "I had a conversation with the people in the house after I found the whiskey. They didn't want to give me their names; I asked them two or three times. The older lady said her name was Mrs. Lambe, and the gentleman said he was Mr. Harrison, and the other lady his wife; they told us the automobile was broken down, but it was the same automobile that was in the back yard, and it was the one they took us down to Apex in. They said their car was broken down there, and that they didn't know what kind of a house it was; they said they had not seen any whiskey and would not have stopped there if they had known there was whiskey there."

Defendant's third exception was taken to the court's refusal to give judgment as of nonsuit upon the evidence.

The remaining exceptions of the defendant were directed to the judge's charge, or to his refusal to charge as specially requested.

Exception four is founded upon the following state of facts: The judge had stated fully the contentions of the State upon the evidence, and had followed this by a statement of the contentions of the defendant. The court, at this point, permitted the solicitor to make a statement of his contentions, as to the condition of the garage, but refused to embrace them in his charge. The court then stating that it allowed the defendant the same privilege, that is, to state his contentions, as to the condition of the garage.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Armistead Jones & Son and Percy J. Olive for defendant.

WALKER, J., after stating the case as above: We have not stated all of the evidence tending to show defendant's guilt, but only so much as is necessary to a proper consideration of the exceptions taken at the trial. There was ample testimony to prove that defendant had liquor in his possession for the purpose of sale.

The testimony to which the defendant objected, and which was admitted, was competent to show how the search of the defendant's premises was made and what was discovered. It laid the foundation for further proof that the liquor was on his premises with his knowledge and consent, and that some of it was placed there by him or at his request. The discoveries tended to show preparation for the sale of liquor. The conduct of the defendant, when he returned to his home, was not that of an innocent man.

The first exception taken to the testimony as to what was said to the officer by some of the parties found at defendant's house, about their being there, and why they were there, is without merit, because if the evidence was competent of itself, the defendant got the full benefit of it afterwards. The error, if any, was harmless, at least so far as the defendant was concerned.

The second exception is equally without any merit. It was competent and relevant to show what was found on the defendant's premises, in the garage and the chicken coop, and the condition of those places. It aroused a grave suspicion of retailing liquor, and gave rise to even more than a suspicion, as it tended strongly to prove an actual sale of liquor. Seven five-gallon kegs of corn whiskey or "monkey rum" in the chicken coop, a half gallon of cork stoppers, a fifteen-gallon keg of bullis wine, a five-gallon jug of scuppernong wine, a glass about the proper size, the bottle wrappers, the locked faucet, with the key in the possession of defendant's wife, and the defendant's behavior when he came back to his home, form an array of circumstances which cannot be denied any potency as evidence of guilt. The condition of the premises, as described by the witnesses, was competent to show the intent and purpose of the defendant in having the liquor.

The refusal to nonsuit was correct. This follows from what we have already, and circumstantially, said about the evidence and its sufficiency. *S. v. Atwood,* 166 N. C., 438; *S. v. Turner,* 171 N. C., 803; *S. v. Dobbins,* 149 N. C., 465; *S. v. Blauntea,* 170 N. C., 749; *S. v. Boynton,* 155 N. C., 456; *S. v. Bush,* 177 N. C., 551. The evidence we have here consists of "pregnant circumstances," as said in *S. v. Turner, supra.* It is the cumulation of facts that makes it all fit for the consideration of the jury, and not any single fact. The evidence in this case is stronger than was that in *S. v. Jones,* 175 N. C., 709, and *S. v. Horner,* 174 N. C., 788, where we sustained the convictions for distilling liquor.

The charge of the court was all that the defendant could ask for. It covered the points in controversy, and, when read altogether, was a correct statement of the law bearing upon the case, and the defendant had the full benefit of the instructions requested by him so far as he was entitled to them. It was not required that the judge should adopt the language of the requests. *Graves v. Jackson,* 150 N. C., 383; *Rencher v. Wynne,* 86 N. C., 269.

The judge fell into error when he stated that the law *presumed* an intent, or a purpose, to sell from the bare fact of possession of more than a quart, but he promptly, and even immediately, corrected the error and gave the proper instruction, in accordance with *S. v. Barrett,* 138 N. C., 630; *S. v. Wilkerson,* 164 N. C., 432, and *S. v. Bean,* 175 N. C., 748. The error was sufficiently retracted, and the correct rule given as to the *prima facie* case, presumption of innocence, reasonable doubt, and burden of proof. It also appears that defendant himself led the court into the error as to the presumption by one of his own requests for instructions (No. 11).

There was no error in permitting the solicitor to restate his contentions while the court was recapitulating them on both sides. If the contentions were misstated, the judge's attention should have been called to it, so that the proper correction could then be made; otherwise, it is too late after verdict to complain. *Bradley v. Mfg. Co.,* 177 N. C., 153.

The doctrine of actual and constructive possession was properly explained to the jury, in respect to its bearing upon the facts of this case, as it is stated in *S. v. Lee,* 164 N. C., 533, and *S. v. Bush,* 177 N. C., 551. There was evidence from which the jury could rightly infer that Hayes Baldwin was acting for defendant in bringing liquor to his premises for the purpose of sale, and also that the defendant was at times actually at his home and engaged in the sale of liquor from a stock, and a large one, which he kept on hand for sale, and at other times was constructively in possession of the premises and liquor for the same illegal purpose.

The trial was free from error, so far as we can see.

No error.

STATE v. E. W. MINCHER.

(Filed 8 October, 1919.)

1. **Indictments—Counts—Larceny—Receiving.**
   A count for larceny and one for receiving stolen goods, etc., may be joined in the same indictment.

2. **Criminal Law—Receiving—Evidence—Guilty Knowledge.**
   Upon a trial for receiving stolen goods, etc., the defendant was an overseer of convicts, and a certain trusty was permitted to spend from Saturday nights to Sunday nights away from camp; there was evidence that he stole certain property, *i. e.,* a certain watch, money, etc., and an itemized account of the articles stolen was in a newspaper to which the defendant subscribed, and the articles afterwards were found in the defendant's possession; that the number on the watch was marked out and the hands thereon changed to destroy its identity. The defendant denied knowing that the watch and money had been stolen: *Held,* the evidence was properly admitted as tending to show his guilty knowledge. *S. v. Stancill,* at this term, cited and applied.

APPEAL by defendant from *Daniels, J.,* at the April Term, 1919, of LENOIR.

The defendant appeals from a judgment pronounced upon an indictment, charging in one count larceny, and in the other receiving one gold watch, three pieces of English gold coin, and one two and a half gold piece of U. S. coin, the property of E. A. Adrey.

The State's evidence tended to show that the defendant had been for six years an overseer of the convict road force of Lenoir County. Among the other prisoners, under the control of and worked by the defendant at the convict camp of the county, was Will Gorham, who had been a trusty for some time. About 18 or 20 December, 1918, a watch and chain were stolen from J. T. Hearne, a witness for the State. On the night of Tuesday, 28 January, 1919, several stores in the city of Kinston were broken open and goods and other articles were taken from them. On the same night the home of E. A. Adrey, a Syrian merchant of the town, was entered and about $300 in bills, gold, and checks were stolen. Among this money were three English gold pounds, one two-dollar-and-a-half gold-piece of American money, a five-dollar gold-piece, half-pound of African money, some Greek money, about the size of a quarter, a Chinese dime, and some Philippine Island money. On the next morning (Wednesday morning) the officers found a track of a man in his stocking feet, and tracked him from about the edge of town to the iron bridge and to the stockade. There they arrested Will Gorham. In consequence of what they learned from him, the latter part of March, 1919, they took out a search warrant and searched the house and premises of the defendant Mincher. This was about forty or fifty yards from the stockade. Put away in a trunk, which was locked, were three gold-pieces, the property of Adrey, and later they obtained from him, in addition to these three gold-pieces, a two-dollar-and-a-half gold-piece, also the property of Adrey. The defendant at the time was wearing the watch of Hearne attached to another chain. The hands had been changed and the number inside had been scratched out. Will Gorham was convicted at the August Term, 1918, of Lenoir County of housebreaking and was serving the sentence of five years on the roads for such offense. Adrey did not succeed in finding or recovering any of the rest of his money. It appeared further from the testimony of Rhem, superintendent of roads, that Gorham was made a trusty in the fall of 1918, and that he, Rhem, left the stockade on Saturday night and other nights. During his absence the convicts were left in charge of Mincher on Saturday and Sunday, and of John Ipock on the next. He further testified that the defendant Mincher had entire charge of the camp when he, Rhem, was absent. The defendant was a subscriber to the *Kinston Daily News* during the period when these robberies were going on, and had been for several years before. It was taken to him by a rural carrier. In the issue of that paper of 30 January, 1919, there was a full account of the robberies the preceding Tuesday night, including those of the Adrey home, and also a list of the coins stolen therefrom. There was evidence also on the part of the State that Will Gorham was permitted to leave camp nearly ever Saturday night, and would not be back until after eleven o'clock Sunday night; that Will Gorham brought money back with him on some of these trips, ten- and twenty-dollar bills, which he gave to the cook, another trusty, to keep for him; that when he gave the two-dollar-and-a-half piece, the English pounds, and some paper money to the defendant on the road; that the defendant knew of Will's bringing to the camp a large quantity of Reyno cigarettes, as the witness overheard Mincher tell Will, "You had better get them cigarettes out of the cage; old Thad Tyndall is talking," and defendant and Will were having secret talks together, mostly every night after supper.

The defendant in his testimony admitted getting the two and one-half dollars and English pound pieces from Will some time in February, 1919. He admitted also getting the watch from Will, but claimed that he did not know that they were stolen. It appears in the testimony that defendant was in Kinston the night in which Hearne's house was robbed; this also he admits.

The defendant moved to quash the indictment upon the ground that the two counts could not be joined. Overruled, and defendant excepted.

The defendant also excepted to the admission of evidence as to the watch found in his possession, because it was shown to be the property of Hearne, and if stolen it was not at the same time when the property described in the indictment was stolen.

Also to the introduction of the *Dailey News*. containing an account of the robberies.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Fred I. Sutton and T. C. Wooten for defendant.

ALLEN, J. It has been the uniform practice in this State to join a count for larceny with one for receiving in one indictment, and this has been repeatedly approved. *S. v. Baker*, 70 N. C., 685; *S. v. Stancill*, at this term.

The evidence as to the watch and the article from the *Daily News* belong to the same class of testimony, and both were competent on the question of guilty knowledge.

The defendant admitted he received the watch as well as the property charged in the indictment from Gorham, a convict in his charge, who had no opportunity to make money, and who was in the habit of leaving camp at night, but he denied that he knew that any of the property was stolen, and this was the real question in controversy before the jury.

The number of the watch had been scratched out, the hands changed, and the defendant testified he was to pay Gorham $8 for it, while Hearne said it was worth $40.

It was also shown that the *Daily News* was delivered to him as a subscriber regularly, and that it contained an account of the stealing from the house of Adrey before the defendant received the property from

Gorham, and the defendant, testifying in his own behalf, did not deny that he knew of the newspaper article.

This evidence comes clearly within the principle of *S. v. Simons* and *S. v. Stancill,* at this term, in which the authorities are collected and discussed.

The Court says in the first of these cases: "There are offenses which are committed in sudden temper, or under violent provocation or by the impulse of passion. As to these, the only competent evidence is what took place at the time, *S. v. Norton,* 82 N. C., 630, but the crime of illicit dealing in intoxicating liquor is in the same class with larceny, counterfeiting, forgery, obtaining money under false pretenses, and burglary, which are all committed with deliberation, in defiance of law, and for the ignoble motive of making profit thereby. In all such cases it is competent to prove intent by showing matters in like nature, before or after the offense"; and in the second, in which the defendant was charged with the larceny and receiving of tobacco, the property of J. H. Little, and evidence that other tobacco, in his possession was stolen from one Wilkinson, was admitted. "The testimony as to the theft of the Wilkinson tobacco was offered merely to show the intent with which the defendants stole this tobacco, and not to prove the accusation substantively. It was sufficiently connected with the main charge to render it competent for this purpose. It was all taken to Raymond Stancill's, the common storehouse for the loot of these defendants. . . . It is said in *S. v. Murphy,* 84 N. C., 742: 'Evidence of a "collateral offense" of the same character and connected with that charged in an indictment, and tending to prove the guilty knowledge of the defendant, when that is an essential element of the crime, is admissible; therefore, on the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property as his in an enclosure of the defendant and demanded its delivery to him, it was held competent for the State to prove by the testimony of another witness that, at the same time and place, and in the presence of the prosecutor and defendant, such witness said that the other hog therein was his, and he then and there claimed and demanded it of defendant.' In that case the Court says, in an opinion by *Justice Ashe,* who always wrote clearly, accurately, and vigorously, and reviews the law at length: 'Wherever the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment,' citing and approving *Yarborough v. State,* 41 Ala., 405; *Thorp v. State,* 15 Ala., 749. The whole question is considered, and fully reviewed, in *Gray v. Cartwright,* 174 N. C., 49, where the authorities are collected. This question is fully discussed by the *Chief Justice* in *S. v. Simons,* at this term, and evidence of the kind admitted in this case is held there to be competent to show knowledge, intent, and motive."

The other exceptions to evidence are untenable and require no discussion, and an examination of the charge shows that it is clear, accurate, full, and fair.

No error.

STATE v. JAKE BRYANT.

(Filed 15 October, 1919.)

1. **Homicide—Murder—Evidence—Circumstantial Evidence—Nonsuit—Trials—Questions for Jury.**

Upon the trial for a homicide, there was evidence tending to show that the defendant, while married to another woman, had unlawfully been living with the deceased; that preceding her death he had quarreled with her, and on the day thereof visited her house in an ill humor and told her, "We had just as well have a war here as to go to France and have it"; asked her to follow him to a place near by, which she did; was never seen alive thereafter, and her body was found, with the throat cut, in a thicket near the place the defendant had designated for their meeting. There was further evidence that deceased had a sum of money in her stocking, in anticipation of taking a journey, and, among other things, a ring on her finger the defendant had given her, and that when her body was found the stocking of the deceased was turned down, the money missing, as also was the ring deceased had given her. There was further circumstantial evidence that the deceased had had her throat cut with a knife she had been carrying, after having voluntary sexual intercourse with the defendant: *Held*, sufficient circumstantial evidence to show that the deceased had not committed suicide, but that she was murdered by the prisoner, and to sustain a verdict of murder in the second degree.

2. **Homicide—Murder—Opinion—Collective Facts.**

The testimony of a witness describing the situation, the surroundings and appearance of the place of the homicide for which the prisoner was on trial, is proper to be considered in connection with the circumstantial evidence in this case tending to show his guilt, and comes within the rule that instantaneous conclusions of the mind derived from a variety of facts presented to the senses at one and the same time, and descriptive of places and things, are admissible. *S. v. Spencer*, 176 N. C., 709, and other like cases, cited and applied.

3. **Appeal and Error—Instructions—Evidence—Corrections—Consent of Appellant—Harmless Error.**

Where, upon the trial of an action, the judge announced that he will grant a new trial for an error he considered that he had committed in admitting evidence, and the defendant insisted that the trial continue, and the judge instructed the jury to disregard such evidence: *Held*, the defendant has no ground to complain that this course was accordingly pursued.

4. Homicide— Murder— Criminal Law— Alibi— Burden of Proof— Instructions.

On the trial of an indictment for a homicide, an instruction that the defendant must satisfy the jury of the alibi on which he relies in his defense, is not erroneous or prejudicial, when coupled with the additional instruction to the effect that if the defendant has failed to do this they must then inquire as to his guilt, and if they are satisfied of the same beyond a reasonable doubt, they will return a verdict of guilty, and if not so satisfied, they will return a verdict of not guilty, approving *S. v. Freeman,* 100 N. C., 429, and other cases cited, as to correct rule regarding the proof, or failure of proof, where defendant relies on an alibi.

INDICTMENT for murder, tried before *Calvert, J.,* at March Term, 1919, of BRUNSWICK.

The defendant was indicted for the murder of Susie Spicer, and was convicted of murder in the second degree. From the judgment upon the verdict he appealed to this Court.

There is no doubt that there was evidence of the *corpus delicti,* so the principal question in the case is, Who killed Susie Spicer? The State's evidence is circumstantial, while the defendant set up an alibi. If the State's evidence was believed by the jury, and they made the proper deductions therefrom, then he was properly convicted; whereas, if they believed defendant's evidence, there was no time in which he could commit the murder, which was unaccounted for.

The principal circumstances upon which the State relied to justify the verdict of guilty were as follows:

There were intimate relations between the deceased and the defendant, extending over a considerable period of time prior to the homicide. When the defendant went to Beaufort for work, the deceased accompanied him, and they lived together there. At this time, the defendant admitted in his testimony, he was married, but while he was in Beaufort his wife was at home with her folks, and died there. In March or April the defendant went to Beaufort and stayed there until 6 July. He also stated that on 3 September of the same year (1918), he married Frances Livingstone in Wilmington. On the afternoon of Saturday, 21 September, 1918, he was at the house of Florence Hendricks, the mother of the deceased, where deceased also lived. There was an interview between them there, and the defendant told the deceased to meet him at Burton's crossroads. He went off in the direction of the crossroads and the deceased soon followed. She was seen no more alive, and her body was found the following Monday morning in a thicket near the crossroads. The deceased was soon to leave for Philadelphia, and had made preparations for leaving on Monday, the 23d, which was probably known to defendant. She had money, which was usually carried in her stocking, and no money was found on her person or about the house after her death; and when found, one stocking was pulled down, the other being in place. When defendant called at the house to see deceased he was in a bad humor, at least. He said to the deceased: "Meet me at Ed. Burton's crossroads. We had just as well have a war here as to go to France and have it." He then went out at the gate and up the road towards Burton's crossroads, and the deceased soon followed him, going in the same direction. The prisoner had given the deceased a ring, which she wore with other rings, and when she was found all the rings were in place except the one ring that deceased had given her. The prisoner's finger-nails on the left hand were trimmed to the quick; those of the right hand were long. The Hendrick's house was about 250 yards from where the body was found, and it was about three-quarters of a mile from where the body was found to the defendant's house at the mill, near Lanvale. The prisoner was seen at home lacing his shoes late in the afternoon by George Morriss, and he wore different clothes from those he had on at the home of Susie Spicer, the deceased, a few hours before; and, on the search by the officer in his house, no clothing of defendant could be found. Defendant's conduct, when asked to assist in the search for Susie on Sunday afternoon, was thus described by the witness, Ed. Burton: "I told Jake, the defendant, 'Susie is missing. I feel uneasy about her. Won't you come and help me hunt her?' Jake said 'Yes,' and they walked with me to Lanvale station. When we got about 200 yards from the fence where we started, Jake said, 'Now, Ed., if there is anything the matter, I am expecting the blame to be put on me.' I said, 'Well, I don't accuse you of anything. I don't know where the woman is.' He said, 'I have been around there so much, if there is anything the matter, the blame will be put on me.' " He was in a visibly unnerved condition when he talked with Florence Hendricks on the train Sunday afternoon, the day after the homicide, and also when examining the knife before Coroner Boyette.

There was some evidence of robbery. Susie Spicer was preparing to go to Philadelphia on Monday, the 23d. She had at least $40, to her mother's knowledge, and usually kept her money in her stocking. When her body was found that Monday morning, the witness, Dr. Boyette, testified: "The right foot was pushed out and the knee kind of turned up and her stocking was below the knee. The right stocking was down. The left stocking was intact. Her leg was perfectly straight." The State contended that this evidence pointed to the defendant, a man who had been intimate with her, and who must have known where she kept her money, as the murderer, particularly when taken in connection with the missing ring, referred to above.

There was testimony of Dr. Boyette, and other witnesses, who viewed the body and its surroundings, before it was moved, which tended to refute any suggestion of suicide. This evidence also tended to show that there had been sexual intercourse by consent between the parties before the murder. The act of copulation had taken place about fifty yards from the place the body was found. After this, it appears that the parties had gone about fifty yards towards the road. One of them sat down at the root of a gum tree. The State contends that it is quite likely there was a quarrel here between the parties, there being evidence that Susie Spicer, the deceased, carried the knife with her from her home; that in the quarrel she may have attempted to use it upon the defendant, who, grasping her wrist and wringing it from her, threw her upon the ground and cut her throat. The jury seems to have taken this view of the case, convicting the prisoner of second degree murder.

The State further contends that the killing could have been done, and the defendant have been at Evan's store in Lanvale at 3 o'clock the same afternoon, as the distance from the place where the body was found to this store, as estimated by the witnesses, was three-fourths of a mile; in other words, about ten minutes for a moderately rapid walker. George Morriss, who, the State contends, seems to have been perhaps the most intelligent of the negro witnesses, and not connected with any of the parties, says: "On the Saturday she was missing, I went from my work (railroad section) between 1 and 2 o'clock. I passed by the home of Susie and saw Jake Bryant and her two little boys there. Jake was eating grapes under an arbor. I stopped and talked with him about twenty minutes. I did not see Susie at this time." The State further contends that it is evident the time referred to by George, he being a railroad hand, was new time, so that, compared with the time used by all the other witnesses, he was at Susie's house between 12 and 1 o'clock. It was after this that Jake went off and Susie followed him. But, as the State insists, assuming that an hour intervened between the time that Morriss saw the defendant at the deceased's house and the time that Needham saw him at Evans' store at Lanvale, said by the witnesses to have been 3 or 3:10 p. m., there would have been ample time for the murder to have been committed and the defendant afterwards to have gone to Lanvale. Of course, if Needham's watch had been set by sun time, there would have been two hours instead of one, and it is noticeable that all the witnesses for the defense are evidently alluding to sun time. To them the mill whistle blew at 5 o'clock. To account for the interval of time not accounted for by the other witnesses, the defendant introduced an old colored woman, named Mary Anderson. She does, if believed, account for it, but the jury refused to yield any credence to her testimony on this point. It does seem to have been "tongued and grooved" to fit in with defendant's own testimony. The same may be said with reference to the testimony of Turner Hazel and Ivey Hobbs.

The deceased by no possibility could have been sitting on her front porch dressed in silk the afternoon of 21 September, about 3:45 o'clock. There was evidence of threats to break her neck made by the prisoner against deceased prior to the time of the homicide, and of his angry words heard by one of the witnesses at a distance from the two, and that the woman was crying.

This is the material evidence, and the contentions of the State, based thereon, to identify the prisoner as the murderer. The State, therefore, insisted that the motion for a nonsuit was properly overruled.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Cranmer & Davis for defendant.

WALKER, J., after stating the case: We have stated above only those facts which the evidence tended to prove, and which are material to the case upon the motion to nonsuit. We do not see how we could well decide that there was no evidence of the prisoner's guilt. It is true that the evidence was circumstantial, but sometimes, and not infrequently, such evidence is of the most convincing character. The prisoner was the last person who was seen with the deceased before the homicide was committed; she followed him, at his request, to the place named by him for their meeting, Burton's crossroads, and, for some reason, not disclosed, they had quarreled, for he said to her, when he asked her to meet him at the crossroads, "We had just as well have a war here as to go to France and have it." She followed him, and was not seen again until her body was found in a thicket near the crossroads. The jury might have fairly and reasonably inferred that they had a difficulty of some kind, and that he was the aggressor, but they took a milder view of the facts, and reduced the grade of the homicide to the second degree. There was ample evidence to prove that the deceased had been killed; that she did not commit suicide; and further, that she was murdered by the prisoner. And this is true, without considering the testimony as to his conduct, the missing money and ring, and what the prisoner said after the homicide had been committed.

The facts in *S. v. Bridgers*, 172 N. C., 879, if stronger to support a verdict of guilty in that case than those we have here, are very slightly stronger, and not enough so, to prevent that case, where the conviction was sustained, from being an authority in support of our present conclusion. It would unreasonably extend the discussion if we attempted any further statement or analysis of the evidence. There is so plainly sufficient evidence for the jury that any further comment would add nothing to the force or strength of the evidence itself.

The objections to the testimony of Dr. Boyette, describing the situation, surroundings, and the appearance at the place of the homicide, and also the condition of the deceased's person, were properly overruled. "The instantaneous conclusion of the mind as to appearance, condition, mental or physical state of persons, animals and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence." *S. v. Leak,* 156 N C., 643; *Renn v. R. R.,* 170 N. C., 128; *S. v. Spencer,* 176 N. C., 709. This covers also several of the other exceptions.

The judge admitted evidence of a difficulty between deceased and defendant on 6 July preceding. Afterwards, having convinced himself that he had erred in this, he announced that he would order a mistrial. Defendant's counsel insisted that the trial should go on, and that they would be perfectly content with his Honor instructing the jury to disregard this testimony. He did so; instructed them at the time, and again in his charge. If there was any error in this it was clearly not against the defendant. *S. v. Johnson,* 176 N. C., 722. The same may be said as to that part of the charge in which he told the jury they might consider evidence of defendant's not fleeing, when he had an opportunity to do so, as a circumstance in his favor. 2 Wharton's Evidence in Criminal Cases, p. 1498.

The judge's charge on the question of the alibi was, it seems to us, not prejudicial to the defendant. He charged substantially that the prisoner relies upon an alibi, which means that he was not, and could not have been at the place of the homicide when it was committed, as he was elsewhere at that time. He is not required to satisfy you of the alibi beyond a reasonable doubt, but if the jury is satisfied from the evidence that he was not at the place when the homicide was committed, and at the time when the deceased met her death, then a verdict of not guilty should be returned, etc. But if the jury is not so satisfied, then it is for the jury to consider all the evidence and say whether or not they are satisfied from the evidence, beyond a reasonable doubt, that the prisoner killed the deceased, etc. This instruction was not erroneous but followed our decisions. *S. v. Jaynes,* 78 N. C., 504; *S. v. Reitz,* 83 N. C., 634; *S. v. Starnes,* 94 N. C., 273; *S. v. Freeman,* 100 N. C., 429; *S. v. Rochelle,* 156 N. C., 641.

The question as to the voices heard by the witness, R. L. Garrison, and whether they were those of the prisoner and Susie Spicer, was for the jury to determine upon all the evidence relating thereto. The jury might well have found that they were the voices of those two persons, and that the prisoner was threatening the deceased, and using angry and abusive language addressed to her.

The other exceptions to evidence have no merit, and require no discussion. The objections to the charge of the court and to the refusal to give instructions are entirely too general to be considered. *McKinnon v. Morrison,* 104 N. C., 354, and the cases cited in Anno. Edition. See, also, *Hendricks v. Ireland,* 162 N. C., 523; *S. v. Herron,* 175 N. C., 754, at p. 759. A general, or what has been called a "broadside attack" on the charge of the court will not do. The error must be specified, both as to the charge and the failure to give all of the instructions, when there is more than one, for if any of the instructions in the charge is correct (and that surely is the case here), or any of the requested instructions should not have been given, the exception fails. *S. v. Ledford,* 133 N. C., 714; *Nance v. Telegraph Co.,* 177 N. C., 313, at p. 315; *S. v. Evans, ib.*, 564, at p. 570.

We have carefully considered and reviewed this case, and have not been able to discover any error therein.

No error.

STATE v. CHARLES L. O'HIGGINS.

(Filed 15 October, 1919.)

1. **Criminal Law—Husband and Wife—Abduction—Elopement—Evidence—Virtue of Wife.**

Testimony of the husband as to the innocence and virtue of his wife, for abducting or eloping with whom the defendant was indicted, under the provisions of Rev., 3360, that she was not a bad woman; that he was "wrapt up in her," and that she was an innocent and virtuous woman, is sufficient to sustain a conviction upon the question of her innocence and virtue since her marriage; and evidence that the defendant had abandoned his motherless children for the purpose, is competent to show his strong infatuation which induced him to elope with another man's wife.

2. **Husband and Wife—Elopement of Wife—Definition.**

Elopement of the wife is her voluntary act in deserting her husband to go away with and cohabit with another man.

CLARK, C. J., concurring, points out the discriminatory feature of the statute.

INDICTMENT, charging defendant with forcible abduction in first count, and elopement with a married woman in the second count, tried before *Stacy, J.,* at May Term, 1919, of CUMBERLAND.

Defendant was convicted on the second count, and from judgment pronounced thereon appealed.

Attorney-General Manning, Assistant Attorney-General Nash, and Sinclair & Dye for the State.

H. McD. Robinson, W. C. Downing, and Robert J. McNeill for defendant.

BROWN, J. The statute under which the defendant was indicted (Rev., 3360) is as follows: "If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and, upon conviction, shall be imprisoned not less than one year nor more than ten years: *Provided,* that the woman, since her marriage, has been an innocent and virtuous woman: *Provided,* that no conviction shall be had upon the unsupported testimony of any such married woman."

The points presented by this appeal may be stated as follows:

(1) Was there any evidence that the eloping wife had been, since her marriage, an innocent and virtuous woman?

(2) Was evidence that the defendant abandoned his two motherless children when he eloped with the woman admissible?

The husband testified that his wife was not a bad woman; that he was "wrapt up in her," and that he knew that his wife was an innocent and virtuous woman. We think this evidence tends very strongly to establish the virtuous character of the wife by the person who had opportunity to know her better than any one else, and that it was amply sufficient to justify the verdict of the jury. The evidence that the defendant abandoned his motherless children in order to elope with Mrs. Miller was competent to prove how strong the infatuation was which induced him to leave his own children in a helpless condition in order to elope with another man's wife.

In charging the jury, his Honor placed the matter clearly before them, and we think his definition as to what constitutes elopement is in accord with established authority. 2 Bl. Com., p. 130; Black's Law Dict., p. 418. These authorities declare an elopement to be the act of the wife, who voluntarily deserts her husband to go away with and cohabit with another man. This is substantially what the judge told the jury.

No error.

CLARK, C. J., concurs fully in all that is said by *Brown, J.,* in his very clear and terse opinion in this case, and adds: It is proper that attention should be called to the following anomalous and extraordinary provision in Rev., 3360, under which this indictment is had: "*Provided,* that no conviction shall be had upon the unsupported testimony of any such married woman." This is without any parallel in the laws of North Carolina, except in the similar provision in Rev., 3354, for "Seduction under promise of marriage," which provides: "The unsupported testimony of the woman shall not be sufficient to convict." In these two cases the witness summoned by the State steps upon the witness stand branded with the provision of law that the jury shall not believe her, even though, on their oaths, they do believe her, unless some one else swears to the same state of facts. There is no such provision discrediting the woman when a witness on an indictment for rape or for an assault with intent, yet such provision would not have been more illogical or unjust than this.

Parties to civil actions, and defendants in criminal actions, were formerly disqualified to testify, but, when made competent by statute, there was no such provision branding them as unworthy of belief, as in this case. On the contrary, notwithstanding their interest, the court must tell the jury that if they believe their testimony they must give it the same weight as that of any other witness. Even the unsupported testimony of an accomplice is sufficient to convict for any crime if the jury shall believe him. *S. v. Jones,* 176 N. C., 703; *S. v. Barber,* 113 N. C., 711. A convict is competent and entitled to exactly the same credit as any witness, if believed. Negroes were formerly incompetent, and some other classes of citizens. But now any witness who is competent to testify has the weight to be given to his testimony left entirely to the judgment of the jury, save and except women. There is no class discrimination in the administration of justice permitted, much less required, by our laws, in any other instance.

In these two cases, though the woman is ordinarily the most necessary witness, and goes to the stand at the call of the State, she is branded as unfit to be believed, and the jury are forbidden to give her testimony any weight whatever, unless some one else, of whatever character he may be, possibly a convict, shall testify to the same purport.

It must be an oversight that such class discrimination on the witness stand has been permitted to remain upon our statute book. It is a slur and a brand upon those who know more about the transaction to be investigated than any one else, except the defendant himself, and as to him, his testimony is not only not discredited, but if he is a witness in his own behalf, or offers other witnesses (or even his silence, if he offers no testimony), has such enhanced weight that he must be found not guilty unless the jury shall find him guilty "beyond a reasonable doubt." Why this discrimination in a court of justice between the two sexes when it is absolutely unknown in any other instance or as to any other class under our laws?

STATE v. BUNKS MEDLEY AND FANNIE ROBERTSON.

(Filed 29 October, 1919.)

Criminal Law—Statutes—Evidence—Witness—Compelling Defendant to Testify—Constitutional Law—Courts—Discretion—Abuse of Discretion.

Where the male defendant is tried under an indictment of highway robbery of a watch, and the *feme* defendant for being present and taking the watch from the prosecutor's pocket, and the male defendant, during the progress of the trial, proposed to examine his codefendant, against her will, to show that he was not with her on the night in question, and that the watch had been found in the bed occupied by her and the prosecutor: *Held*, construing Rev., 1630, 1634, and 1635 together, the *feme* defendant was not compellable to testify as to the crime charged, under the present indictment, or as to her guilt of the crime of criminal prostitution under the acts of 1919, ch. 215; and while, at times, evidence of this character may be essential to the enforcement of the criminal laws of the State, the trial judge is allowed a large discretion in his rulings to preserve the constitutional rights of the witness, which will not be disturbed unless substantial error is shown; and his ruling in this case, in not compelling the witness to testify, is approved.

APPEAL by defendant from *Bynum, J.*, at the March Term, 1919, of FORSYTH.

Indictment for highway robbery in feloniously taking by force a watch, etc., from the person of one G. M. Simpson, count also for feloniously receiving said watch, etc. There was verdict of guilty as to both defendants, with recommendation of mercy as to Fannie Robertson. Judgment imposing sentence on Bunk Medley, the male defendant, and he excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Moses Shapiro and Fred M. Parrish for defendant.

HOKE, J. There were facts in evidence tending to show that in March, 1919, about 12 o'clock at night, or shortly thereafter, on the streets of Winston-Salem, the defendant, Bunks Medley, held up the prosecutor with a pistol, while the female defendant went through his pockets, taking his watch, etc. There were other facts tending to confirm the direct evidence on the subject.

During the progress of the trial, the male defendant proposed to examine his codefendant, Fannie Robertson, as a witness, stating that his purpose was to show by her that he was not with her that night, and had not been for two months. And that the watch which she had in her possession (that of the prosecutor) had been found in the bed which had been occupied by her and the prosecutor Simpson. Said Fannie Robertson having stated that she did not care to take the stand as a witness, the court declined to allow her to be examined as proposed, and defendant excepted. Speaking generally, and under section 1630 of Revisal, all parties and persons interested are made competent and compellable to testify as witnesses in judicial investigations or before courts or tribunals having power to hear and examine evidence, except in actions or other proceedings instituted on account of adultery or in actions for criminal conversation.

Under section 1634, in all indictments, complaints, or other proceedings against persons charged with crimes, etc., the person so charged shall, at his own request, and not otherwise, be a competent witness, etc. And in section 1635 it is provided that nothing in the preceding section (1634) shall render any person charged with a criminal offense competent or compellative to give evidence against himself, nor shall render any person compellative to answer any question tending to incriminate himself, etc., etc. Construing these and other sections appertaining to the subject, it has been held that on trial for crime any defendant is competent and compellable to testify for or against a codefendant, provided he is not compellable to give evidence that may tend to convict him, either of the crime charged or other offense against the criminal law. *S. v. Smith,* 86 N. C., 705.

While this is at present the authoritative interpretation of the statute law on the subject, and the position may be at times essential to the efficient enforcement of the criminal laws of the State, in its practical application it is very difficult to safeguard the constitutional guarantee of such a witness against self-incrimination, when the question of his own guilt is involved in the issue, and before the same jury. In such case the trial judge should be allowed a large discretion in the matter, and his rulings in the effort to preserve the constitutional rights of the witness should not be disturbed, unless substantial error is very clearly made to appear. A perusal of this proposed evidence will show that the greater and most significant part of it not only tended to establish an essential fact towards her conviction of the offense charged, and for which she was then on trial, but it also had a direct tendency to establish her guilt of the crime of criminal prostitution under the Acts of 1919, ch. 215.

In *Smith v. Smith,* 116 N. C., 386, it was held on this question that the true intent and meaning of this article of the Constitution, sec. 11, Art. I, is that a witness shall not be compelled to answer any question, the answer to which would disclose a fact which forms an essential link in the chain of testimony which would be sufficient to convict him of a crime. And *Chief Justice Faircloth,* delivering the opinion, said: "We think the provision of our Constitution ought to be liberally construed to preserve personal rights and protect the citizen against self-incriminating evidence." Even if the first portion of this suggested evidence could be considered as a separate proposition, that is, that she had not been with the male defendant for two months, there is doubt on the facts of the record if the witness should be forced to respond to questions concerning it. True, if the witness had answered as the male defendant desired, such answer might have been insisted on, but suppose the answer had been to the contrary, or suppose that, unwilling to support the prisoner by false evidence, she had refused to answer the question, this would of itself have been a pregnant circumstance against her on the issue as to her own guilt. True, as appellant contends, it is ordinarily desirable that a witness be called to the stand, so that the court may more intelligently determine whether the questions and answers will trench upon his constitutional privilege, but on the facts of the present record, and considering the issue, the position of the parties concerning it, and the evidence as proposed, we are of opinion that the power of his Honor in the premises has been providently exercised, and we approve his ruling in refusing to have the witness called to the stand and subjected to the proposed examination.

There is no error, and the judgment is affirmed.

No error.

STATE v. ZELLA PHILLIPS AND MARY KEY.

(Filed 5 November, 1919.)

1. **Evidence—Nonsuit—Trials—Questions for Jury.**
   Upon motion to nonsuit in a criminal action, the plaintiff's evidence is to be considered in the light most favorable to him, and when it is thus found to be sufficient, its weight, and the credibility of the witnesses, are for the determination of the jury.

2. **Evidence—Character—Substantive—Criminal Law—Instructions—Appeal and Error—Harmless Error.**
   Testimony as to the character of witnesses other than the parties to a criminal action may not be regarded as substantive evidence, but where a party, with other witnesses, have testified at the trial, the charge of the court will not be held for reversible error when it appears that in apparently instructing otherwise, he could only have been speaking with reference to those witnesses who were not parties.

3. **Witnesses—Evidence—Children—Findings—Appeal and Error.**
   The finding of the trial judge as to the competency of a witness to testify on account of his childhood is conclusive on appeal.

4. **Appeal and Error—Objections and Exceptions—Evidence—Restrictions—Rules Supreme Court.**
   Exceptions to evidence admitted generally for all purposes, on the ground that it should have been restricted, or that it was incompetent in part, should be based upon the refusal of the trial judge to a request thereto made at the time of its admission, or it will not be considered on appeal. Supreme Court Rule 27.

INDICTMENT for fornication and adultery, tried before *Bryson, J.*, at July Term, 1919, of SURRY.

Defendants were convicted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. L. Reece, J. H. Folger, and J. Crawford Biggs for defendants.

BROWN, J. The motion to nonsuit was properly overruled. On this motion the evidence must be construed in a light most favorable to the State for the purpose of determining its legal sufficiency to convict, and this being shown, its weight and the credibility of the witnesses are for the determination of the jury. *S. v. Carlson*, 171 N. C., 818. Applying this rule to the State's evidence, it seems clear that there was evidence sufficient. The crime itself is of such a character that its commission, speaking generally, can only be determined by circumstances which accompany the relation of the party. In this case, however, there was direct evidence by the witness, Sarah Key, who testified she saw defendants in bed together on three different occasions. It is useless to discuss this evidence. If it is believed by the jury it is amply sufficient to justify conviction of both defendants. The defendants offered evidence as to their good character, and also there was evidence offered as to the good character of witnesses. The defendant excepted to the following part of the charge:

"Witnesses have been offered as to character. This evidence you will not consider as substantive evidence, but only as corroborative, and the law does not presume that a person proven to be of bad character has necessarily told a false story, but you may consider evidence of good character or bad character as bearing upon the weight you should give the testimony of the witness. You are the sole judges of the facts; you are the sole judges of what the evidence is and the weight you should give it."

It is undoubtedly true that where defendant offers evidence of good character, even without being sworn as witness, it is substantive evidence to be considered by the jury for what it is worth as tending to prove the innocence of the defendant. *S. v. Morse*, 171 N. C., 777. But we think that the defendants were not prejudiced in this case. The judge, in stating that the evidence as to character was referring, not to the character of the accused, but to the witnesses whose characters had been proven. This construction of his Honor's language is borne out by that part of his charge in which he says: "The law does not presume that a person proven to be of bad character has necessarily told a false story, but you may consider evidence of good character as bearing upon the weight you will give to the witnesses."

The other exceptions are entirely without merit. From *S. v. Perry*, 44 N. C., 330, to *S. v. Merrick*, 172 N. C., at 872, it has been consistently held by this Court that the finding by a trial judge that an infant is competent to testify is conclusive. As to the remaining objection, it is met by Rule 27 of this Court, as follows: "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that the purpose shall be restricted." See *Plemmons v. Murphy,* 176 N. C., 671.

No error.

STATE v. JOHN W. MOON.

(Filed 5 November, 1919.)

1. **Statutes—Amendments—Effect.**

   The effect of an amendment to a statute is to incorporate the old statute into the amendment with the same effect as if the amendment had been a part of the old statute when the latter was enacted.

2. **Bigamy—Criminal Law—Statutes—Courts—Jurisdiction—Bigamous Cohabitation—Constitutional Law.**

   The amendment to Rev., 3361, ch. 26, Public Laws 1913, making it a felony and punishable as in cases of bigamy, for a married person to marry again, in another State, which would have been bigamous if contracted here, and "thereafter cohabit with such person in this State," does not attempt to confer extra territorial jurisdiction upon our own courts, the offense for which the person is tried, being one committed here.

3. **Bigamy—Criminal Law—Statutes—Trials—Place Offense Was Committed—Venue—Bigamous Cohabitation.**

   A plea in abatement upon the ground that Rev., 3361, as amended by ch. 26, Public Laws 1913, makes the offense of bigamy and not the offense of bigamous cohabitation triable in the county in which the offender should be apprehended, is bad.

INDICTMENT, tried before *Lane, J.,* at June Term, 1919, of GUILFORD. The defendant was convicted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. G. Gold and L. B. Williams for defendant.

BROWN, J. Defendant was convicted at the June Term, 1919, of Guilford County Superior Court, of bigamous cohabitation, under Rev., 3361, as amended by chapter 26, Public Laws 1913. That section, as amended, reads as follows, so far as material:

"*Bigamy.* If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding, or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy."

The defendant filed a plea in abatement upon the ground that the bigamous cohabitation took place in Buncombe County, and not in Guilford. Defendant contends that the part of section 3361 which permits the defendant to be tried in the county in which he is apprehended, applies only to the offense of the bigamy itself, and not to the offense of bigamous cohabitation.

The following is the wording of chapter 26, Public Laws 1913, which is the amending statute:

"That section three thousand three hundred and sixty-one of the Revisal of one thousand nine hundred and five be, and the same is hereby, amended by striking out the words 'whether the second marriage shall have taken place in the State of North Carolina or elsewhere,' in lines two, three, and four thereof, and by inserting in line ten, between the words 'county' and 'providing,' the following: 'If any person being married shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and punishable as in cases of bigamy.'"

The legal effect of the amendment is the reënactment of the old statute with the amendment incorporated in it, and the amendment, from its adoption, has the same effect as if it had been a part of the statute when first enacted. *Nichols v. Board*, 125 N. C., 13. The plea in abatement was properly overruled. It is further contended that the amendment of 1913 is unconstitutional inasmuch as its effect is to punish the defendant for a crime committed outside of the territorial limits of the State. This contention cannot be sustained. It is an offense committed in North Carolina called bigamous cohabitation. Similar statutes have been enacted in the States of Alabama, Iowa, Massachusetts, Minnesota, Missouri, Tennessee, and Vermont, and in each of these States they have been sustained.

In Alabama, *Cox v. State*, 117 Ala., 103; 67 Am. S. R., 166; 41 L. R. A., 760.

In Iowa, *S. v. Steupper,* 117 Iowa, 591; *S. v. Sloan,* 55 *ib.,* 217.
In Massachusetts, *Com. v. Bradley,* 2 Cush., 553.
In Minnesota, *S. v. Johnson,* 12 Minn., 467; 93 Am. D., 241.
In Missouri, *S. v. Stewart,* 194 Mo., 345; 5 Ann. Cas., 963.
In Tennessee, *Kenneval v. State,* 107 Tenn., 581.
In Vermont, *S. v. Palmer,* 18 Vt., 570.

In *S. v. Ray,* 151 N. C., 714, *Judge Hoke* says: "As now advised, and speaking for himself, the writer sees no reason why a State should not declare the coming into the State and cohabitating together here by a party, after a bigamous marriage in another State, a felony, and punish it as such."

No error.

STATE v. JACK RUMPLE ET AL.

(Filed 5 November, 1919.)

1. **Criminal Law—Lynching—Statutes—Constitutional Law.**

Our statutes, Rev., 3698, to prevent lynchings, making it a felony to conspire to break or enter any jail, etc., for the purpose of killing or injuring any prisoner confined therein, charged with crime or under sentence; and Rev., 3233, also entitled "Lynching," giving an adjoining county jurisdiction over the crime and offender as "full and complete . . . and to the same extent" as if the crime had been committed therein, are a valid exercise of the legislative powers.

2. **Criminal Law— Lynching— Statutes— Indictments— Bad Counts Disregarded.**

An indictment under Rev., 3698, designated to prevent lynching, and brought in an adjoining county under Rev., 3233, charged: (1) a conspiracy to break a prison; (2) breaking and entering the prison with intent, etc.; (3) a riot and disorderly conduct; and (4) defacing and entering a certain building. The first and second counts were good, and, *Held,* if the third and fourth were bad, in not stating an offense under the statute, they may be disregarded, and conviction had on the first and second ones.

3. **Criminal Law— Lynching— Statutes— Attempt— Courts— Jurisdiction— Adjoining County—Less Offense.**

Under the provisions of Rev., 3269, a defendant, charged in the indictment of a greater criminal offense, may be convicted of the same crime of a less degree, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime; and the trial of an attempt to lynch a prisoner, under Rev., 3698, is not prohibited in the adjoining county under sec. 3233, on the ground that the latter section provides only for the completed offense, sec. 3698 conferring the jurisdiction as full and complete and to the same extent as if the crime had therein been committed.

4. **Criminal Law—Lynching—Mob—Common Purpose—Evidence—Declarations of Others.**

Where there is evidence that the defendant charged with an attempt at lynching an incarcerated prisoner, Rev., 3298, was of a crowd that had conspired together for the purpose, and actively participated in the common design, the acts and declarations of other members of the crowd relative thereto, are evidence against him; and when such acts and declarations occurred after the dispersal of the crowd by the militia, it does not affect the matter, if they occurred while the mob was actually engaged in preparing to resume their unlawful purpose.

APPEAL by defendants from *Long, J.*, at the February Special Term, 1919, of SURRY.

The defendants were convicted under the statute enacted to prevent lynching, and have appealed from the judgment pronounced upon the verdict.

The indictment was found, and the defendants tried in the county of Surry, and the crime was committed in Forsyth County.

The indictment originally contained four counts: (1) A conspiracy to break a prison; (2) breaking and entering the prison with intent, etc.; (3) a riot and disorderly conduct; (4) defacing and injuring a certain building.

A *nol. pros.* was entered as to the third and fourth counts before the case was submitted to the jury.

The defendants, Chris Chappell, Ira Whitaker, and A. R. Castevens, were convicted on the first and second counts in the indictment, and the defendants, Frank Hester, Wynn Carter, J. E. Savage, and George Douthit, were convicted of an attempt to commit the crime charged in the second count.

The evidence tended to prove that on 17 November, 1918, Russell High was arrested about twelve or one o'clock in the day on the charge of a criminal assault upon Mrs. Childress, and was imprisoned in the city guardhouse; that about three o'clock the prison was attacked by a mob, who broke it open and did serious damage to the building, the purpose of the mob being to lynch High; that the riot continued during the afternoon, far into the night; that the home guard was called out, and succeeded in dispersing the crowd for a while, but that it then became necessary to send troops from Raleigh and Charlotte; that stores were broken open after the home guard reached the prison for the purpose of getting firearms to be used in capturing the prisoner High.

Evidence was admitted over the objection of the defendants as to the declarations and acts of those in the crowd.

The other exceptions relied on by the defendants are stated in the opinion of the court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Benbow, Hall & Benbow and W. H. Beckerdite for George Douthit and Wynn Carter.

J. Gilmer Korner, Jr., Fred S. Hutchings, and Lewis M. Swink for Frank Hester.

Hastings & Whicker and J. B. Craver for J. E. Savage, A. R. Castevens, Ira Whitaker, and Chris Chappel.

ALLEN, J. The defendants are indicted under a statute enacted in 1893, designed to prevent lynching, the material parts of which, as applicable to this appeal, are embodied in sections 3698 and 3233 of the Revisal, and are as follows:

"3698. *Lynching.* If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime, or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoners, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the State's prison or the county jail not less than two nor more than fifteen years."

"3233. *Lynching.* The Superior Court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime, and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county."

The statute has been sustained as a valid exercise of legislative power, and an indictment has been approved which was found by the grand jury of Union County for the offense committed in the county of Anson, and containing three counts, the first two of which were practically identical with the first and second counts of the present indictment. *S. v. Lewis,* 142 N. C., 626.

The defendants, admitting this much, say, however, the indictment is bad because, (1) it charges the defendants, in the third count, "with an attempt to commit the alleged crime of lynching in the county of Forsyth," and "that the grand jury of Surry County has no jurisdiction or authority in law to present a bill of indictment for the matters and things therein alleged"; (2) it charges the defendants, "in the third and fourth counts with the alleged crime of riot, disorderly conduct, and with defacing, damaging, and injuring a certain building in the city of Winston-Salem, county of Forsyth, known as the Municipal Building, all of which crimes are alleged to have been committed within the county of

Forsyth, State of North Carolina, and these defendants are advised and believe that the grand jury of Surry County has no authority or jurisdiction in law to present to this court a bill of indictment against these defendants for the matters and things therein alleged, and this court is without jurisdiction to put these defendants on trial therefor, but that the grand jury of Forsyth County has the proper authority and jurisdiction to present such indictment for said crimes therein alleged."

The first ground of objection to the indictment is not true, in fact, as neither the third nor the fourth count charges an *attempt* to commit the crime of lynching, and this is recognized in the second plea of the defendants, which describes the third count correctly as charging the crimes of "riot, disorderly conduct," and the fourth as charging the defendants "with defacing, damaging, and injuring a certain building."

But neither of the objections, if otherwise valid, can avoid the defendants, because the first and second counts are not assailed, and a defective count does not vitiate the indictment. "If one count is bad for failure to state any offense, or to state it with sufficient precision, this will not render a good count bad." Clark's Crim. Procedure, 299. To the same effect, *S. v. Holder,* 133 N. C., 710; *S. v. Avery,* 159 N. C., 495.

"In criminal cases the practice of uniting counts for cognate offenses has always been encouraged, not merely because in this way the labor of the courts, and the expenses of prosecution are greatly diminished, but because it relieves defendants of the oppressiveness which would result from the splitting of prosecutions." *S. v. Toole,* 106 N. C., 739.

Again, a *nol. pros.* was entered as to the third and fourth counts before the case was submitted to the jury, and the defendants have never been tried on those counts, and have suffered no injury by having them incorporated in the indictment.

The defendants next contend that the statute conferring jurisdiction on the courts of an adjoining county deals only with the completed offense, and not with an attempt to commit the offense, and, if the third and fourth counts were properly eliminated, there was no charge of an attempt left in the indictment, and that it was error to submit to the jury the view that the defendants might be convicted of an attempt to commit the crime charged, but here the defendants are met by the language of the statute, which says that the Superior Court of the adjoining county "shall have full and complete jurisdiction over the crime, and the offender, to the same extent as if the crime had been committed in the bounds of such adjoining county," and by section 3269 of the Revisal, which provides that, "Upon the trial of any indictment, the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

The charge of the crime includes an attempt, and under the latter statute it cannot be doubted that the defendants could have been convicted of an attempt under an indictment, charging the principal offense, found and tried in the county of Forsyth, and if so, the same result must follow when the indictment is found and tried in an adjoining county, which, under the statute, has as "full and complete jurisdiction over the crime" as the courts of Forsyth.

This is not a harsh rule, but is favorable to defendants, as to hold otherwise would divide the crime and subject them to the hardship and expense of defending successive indictments in different counties, a result which the General Assembly could not have contemplated.

There was also a motion for judgment of nonsuit in behalf of each defendant.

We have examined the record and find evidence that the defendants were present and participated actively in the unlawful conduct of the mob, as alleged in the indictment, and there was no error in overruling these motions. It can serve no useful purpose to point out the evidence against each defendant, and we refrain from doing so.

The evidence, much of it circumstantial, tended to prove concert of action—a conspiracy—to break the municipal prison and take a prisoner confined therein, for the purpose of lynching him, and that the defendants were active participants in the common purpose, and under these conditions the declarations and acts of members of the crowd, were competent against the defendants.

In *Saunders v. Gilbert,* 156 N. C., 463: "It appearing that many persons had gathered in the streets and followed the plaintiff to his home, where they stopped in front of his house, some or all of them using abusive and threatening language. The question arose in the trial below, whether these outcries of this mob or unlawful assembly were competent against each and every one of the crowd. With regard to this, we said: 'The testimony as to what was said in the road, and in front of the plaintiff's home, was clearly competent. The *res gestæ* includes what was said, as well as what was done. The acts and the outcries of this unlawful assembly—for that is, in plain speech and in law, what it was—is held to be competent as *pars rei gestæ,* and also as tending to show their purpose or *quo animo.* Nothing is better settled than this rule of evidence. *S. v. Rawls,* 65 N. C., 334; *S. v. Worthington,* 64 N. C., 594. We find it stated in 4 Elliott on Evidence, sec. 3128, that "What is said and done by persons during the time they are engaged in a riot (or unlawful assembly) constitutes the *res gestæ,* and it is, of course, competent, as a rule, to prove all that is said and done"—the acts and words of the mob, or any members of it, as in *Rex v. Gordon,* 21 State Trials, 485 (563), wherein evidence of the cries of the mob, "No

Popery," as it was proceeding towards Parliament House, were held competent and admissible as a part of the *res gestæ.*' This would seem to be a full answer to these objections. The same rule of evidence had been before stated and applied by us in *Henderson-Snyder Co. v. Polk,* 149 N. C., 104, 107. We there held that where two prisoners are engaged together in the execution of a common design to defraud others, the declarations of each relating to the enterprise and in furtherance of it, are evidence against the other, though made in the latter's absence, if a common design has been shown, citing *Lincoln v. Chaplin,* 7 Wallace (U. S.), 132. It is, perhaps, the universal rule that any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetration of the alleged conspiracy may be given in evidence against himself or his coconspirators." *S. v. Davis,* 177 N. C., 576.

It is true that some of these declarations and acts were after the crowd had left the prison on the arrival of the home guard, but it appears that they had not abandoned their purpose, and, on the contrary, that when a store was entered forcibly, a fact to which the defendants strenuously object, it was for the purpose of securing firearms to be used in capturing the prisoner High.

These are the objections chiefly relied on, and we find no error in them, or in the other exceptions appearing in the record.

No error.

STATE v. DOLL LITTLE.

(Filed 12 November, 1919.)

1. **Homicide—Murder—Self-defense—Burden of Proof—Quantum of Proof.**
   It is reversible error for the judge to instruct the jury, upon a trial for a homicide, that the defendant must prove beyond a reasonable doubt that the defendant had shot the deceased under his reasonable apprehension that it was necessary to save his own life or himself from great bodily harm, it being only required that he satisfy the jury of the truth of the facts upon which he relies in defense.

2. **Homicide—Murder—Evidence.**
   Evidence, upon the trial of a homicide, that the prisoner drew his pistol and shot the deceased four times, inflicting death, without evidence that the deceased was armed, is sufficient to sustain a verdict of murder in the first degree.

APPEAL by defendant from *Shaw, J.,* at April Term, 1919, of ANSON.

The defendant was convicted of murder in the first degree, and from the judgment upon such conviction appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

McLendon & Covington, B. V. Henry, and A. M. Stack for defendant.

BROWN, J. The prisoner was convicted of the murder of one Will R. Honeycutt on 19 September, 1918, and the record of the trial presents sixteen exceptions; one to the refusal to admit testimony, ten to the judge's refusal to charge as requested, and five to his charge as given. We will consider only two.

The homicide occurred at a cotton gin at Morven in Anson County. The evidence tended to prove that the prisoner and the deceased had an altercation about priority in getting under the sheds and to the gin with their wagons. There is no evidence that the deceased was armed. All the evidence proved that the defendant drew a pistol and shot the deceased, and that the deceased was struck four times and died from the wounds. There was much evidence introduced, which it is unnecessary to set out.

The prisoner requested the court to charge the jury that there was no evidence of murder in the first degree. We cannot sustain this exception, but will not discuss the evidence, as it might prejudice the prisoner on another trial.

In the charge to which the defendant excepted, the court told the jury, among other things, "In passing upon the question, you can put yourselves in the position of the defendant and see whether or not he reasonably apprehended it was necessary to shoot in order to save his own life or himself from great bodily harm, and if he has satisfied you, from all the evidence, beyond a reasonable doubt, if he has satisfied you that he did not provoke the difficulty and did not enter into it willingly, and after getting into it, that he used no more force than was reasonably necessary, the court instructs you that if you find these to be the circumstances under which he killed him, that it would be justifiable homicide, and it would be your duty to return a verdict of not guilty."

This instruction was erroneous and well calculated to injure the prisoner. The burden of proof is always upon the State to satisfy the jury beyond a reasonable doubt in order to convict of a criminal offense. But where the defendant undertakes to reduce the killing to murder in the second degree, or to manslaughter, he is only required to satisfy the jury of the truth of the facts upon which he relies. This is elementary now in this State. In the brief of the learned Assistant Attorney-General, he admits that the expression "beyond a reasonable doubt" is plainly error, but contends it is a mere slip of the tongue, and that it was corrected in the charge.

We fail to see that it was immediately corrected, and so explained to the jury. It is a very important rule of evidence, as there is quite a difference between satisfying the jury of the truth of a fact and of convincing it beyond a reasonable doubt.

We think the prisoner is entitled to a
New trial.

STATE v. JOE CAIN ET AL.

(Filed 12 November, 1919.)

1. **Homicide—Murder—Manslaughter—Evidence—Malice—Instructions.**

Evidence that the prisoners tried for homicide were operating an illicit still in the neighborhood of the house of the deceased, which had been captured and destroyed, that the prisoners accused the deceased of giving the information, and threatened him if the still was not replaced by a certain night, and within a short time thereafter the killing occurred at night at the home of the deceased, with testimony that the prisoners attacked in a body, firing a number of shots, one of which took fatal effect, is sufficient to show motive and killing with premeditation, and to justify a verdict of murder in the first degree, and, without further testimony, for an instruction that there was no evidence of manslaughter; or, *Semble*, of murder in the second degree.

2. **Homicide—Murder—Evidence—Dying Declarations.**

Dying declarations as to the identity of the prisoners on trial for a homicide are not rendered incompetent to be submitted to the jury by the fact that the physician, to whom they were made, told the deceased, after the former had said he would die from the wound he had received, that he would not, the deceased then reaffirmed that he would. The court having found that these statements were made under an impending sense of death, properly left them to the consideration of the jury.

3. **Homicide—Murder—Evidence—Common Design.**

Where there is evidence that the prisoners threatened the deceased if he did not replace a destroyed still they accused him of giving information about, and that the prisoners attacked the home of the deceased in a body at night, all firing upon him, and one of the shots taking fatal effect, a charge is correct that if the jury should find beyond a reasonable doubt that the prisoners formed a common design and purpose to go to the house of the deceased and assault him with firearms, or to inflict great bodily harm upon him, and in pursuance thereof, one of them shot and killed him according to a common purpose, all the prisoners would be guilty of murder in the first degree.

4. **Appeal and Error — Homicide — Murder — Instructions — Typographical Omissions.**

Where, upon the trial of an action for a homicide, the question of error devolves upon whether the several prisoners, or some of them, were guilty of murder in the first or in the second degree, an exception to a part of the charge, "if you find any of the defendants guilty of murder in the second degree, because only one defendant could be guilty of murder in the second degree," will not be sustained, when construing it with the balance of the same paragraph, it will appear that, through typographical error, there was an omission of the only words which would give the instruction a meaning, and when thus given would render the charge a correct one, and that the jury must have so understood it.

5. **Appeal and Error — Homicide — Murder — Objections and Exceptions — Amendments.**

On appeal from a conviction of murder in the first degree, *Semble*, exceptions to the charge omitted by counsel's oversight may be supplied on a *certiorari* from the Supreme Court, but they were not allowed in this case because of no merit in the errors alleged.

6. **Appeal and Error—Objections and Exceptions—Instructions.**

An exception to an instruction as to one of several defendants having formed a common design to commit a homicide with the others, is immaterial as to him on appeal, when it appears that he was acquitted at the trial.

ALLEN, J., concurring in result.

APPEAL by prisoners from *Lane, J.*, at February Term, 1919, of SURRY.

The prisoners, Joe Cain, Joe Bowles, and Gardner Cain, were convicted of murder in the first degree of Riley Easter, and from the sentence thereon appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Folger, Jackson & Folger and J. C. Biggs for prisoners.

CLARK, C. J. There was evidence of motive that the prisoners were operating an illicit still in the vicinity of Riley Easter's home, and that the deceased and his son, James Easter, knew of it, and that the prisoners accused Riley Easter and his son of giving information which caused the still to be captured and destroyed; that they made threats and sent him a message that if it was not replaced that there would be trouble, and there was evidence that Walter Cain, son of Joe Cain, went to the Easters and gave him notice that the other defendants were enraged at his having had the still taken, and unless put back by Sunday night they would do some injury or violence to him. There was evidence that the still was not returned by Sunday night, and that on the next night Riley Easter was slain. There was also evidence that one Andy Martin was induced by John Hicks, one of the defendants, to go to Easter and warn him to put the still back. There was much other evidence to the same purport, and that on the Monday night in question

Joe Bowles, Joe Cain, Gardner Cain, and John Hicks were seen and identified by the inmates of Riley Easter's house, and also by Riley Easter himself; that they knew these men, having lived in that community for some months, seeing them frequently; that these men had come to Riley Easter's house often, and spent much time there; that on this Monday night Mrs. Easter and her daughter were out of doors, it being moonlight night, the moon well up, and about ten or eleven o'clock at night, as they testified, these four men came up near the house, one of them testified that she knew Joe Cain's voice; Mrs. Easter and her daughter, Mrs. White, ran to the house, and as they got in the door they exclaimed that these four men were out there, calling them by name. The son, Jimmie Easter, was in the house, and Riley Easter went to the door, thinking it was revenue officers, and said, "Hello," and invited whoever it was to "come in"; that there was then the simultaneous report of four guns, and a bullet struck Riley Easter, entering his body, and subsequently causing his death; that at that time it was so bright that Riley Easter was able to recognize the men out there; that the firing became rapid, from four guns, and Mrs. Easter testified that she saw flashes coming from four weapons of some kind in the hands of these four men; that she was able to recognize the three defendants who were convicted and Walter Cain; that a number of shots were fired into the room or side of the house, some going into the room or side of the house, some going into the room, and that these men then made a rush for the door; that James Easter then got his pistol and fired two shots; that the inmates closed the door to keep the assailants out, but the door failed to close fully, leaving a sufficient opening to see out; that these men were pushing against the door, and Mrs. Easter saw Joe Cain appearing through it, seeing him plainly; that one of her daughters from another door had also seen these men and recognized them and other inmates of the house say they saw these men and identified them. One of the women said: "You have killed pap and my baby." Then these men got off the steps at the door and went away. There were a large number of shots fired, as appeared by the bullet holes on the door facing and door, as testified to by officers and other persons. A shotgun and pistol were found next day at Walter Cain's, and there was also evidence that Gardner Cain owned a repeating rifle and a pistol, and that Joe Cain also had guns and pistols. These weapons which were found at their houses or known to have been owned by them and found in their vicinity, were put in evidence.

Riley Easter stated to Dr. Hollingsworth when he first came in that he was going to die. Though the doctor told him he was not, Riley Easter repeated the statement that he was going to die, and said that these men, naming the defendants and Walter Cain, had killed him. He said they were all shooting. The judge found as a fact that Riley Easter made these statements under an impending sense of death, and admitted them as dying declarations, with proper instructions. Riley Easter died 10 a. m. after the night he was shot.

There were exceptions to the admission of evidence, and to one or two alleged errors in reciting the contention of the parties. But they do not require discussion. The evidence that Riley Easter, notwithstanding the remark of the doctor that he would not die, repeated that he would, and subsequently made his declaration that these prisoners had shot him in the manner above detailed. The doctor testified that he thought then Riley would die. The two alleged errors in the recital of the evidence by the judge are very slight, and he told the jury that they must take their own recollection of the testimony. The two exceptions chiefly relied upon are the following statements in the charge: "Now, if the jury shall find from the evidence in this case, beyond a reasonable doubt, that these defendants, Joe Cain, Gardner Cain, Joe Bowles, Walter Cain, and John Hicks formed a common design and a common purpose to go to the house of Riley Easter and assault him with guns and pistols, or to inflict any bodily harm upon him or the inmates of his house, and if you further find beyond a reasonable doubt that in pursuance of this common design and purpose entered into and agreed to by all of them, that they were there, and that when Riley Easter came to the door some one of them fired a shot into his body from a weapon and killed him, and that this was done in pursuance of the common design entered into by all of them, and death was caused to him in that way, after it had been premeditated and deliberated upon by them, and they did it with malice, then all would be guilty of murder in the first degree."

There was evidence of the motive and of the threats of these prisoners, that they came up about 11 o'clock at night armed with deadly weapons, and all four of them firing simultaneously at Easter and into the house, and evidence by the inmates identifying the prisoners. In this instruction there was no error.

When the officers sought to arrest the three defendants who were convicted, and went to Joe Cain's house, his wife said he was not at home, but he was found in the loft in which there was no floor, and to which there was no access by ladder or steps. The officers found Gardner about 300 yards from his house in the woods, lying between two logs, with his pistol tucked under some leaves near his head. Joe Bowles was found covered up in bed with all his clothes on. A shotgun and his clothes were found in a tree not far from Gardner Cain's house. Walter Cain and John Hicks, who alone of the prisoners went upon the stand, testified that they were not present at the shooting and were acquitted. Walter Cain testified, however, that he was at the Easter's Sunday morning, and told them that they had better take that thing back to keep down trouble for his father (Joe Cain) and Gardner Cain were mad about it, and that he had seen a shotgun at Gardner's house like the one that was found near there.

John Hicks also testified that he told Andy Martin that he thought the Easters were going to get into trouble, and to tell them to take the still back.

The court charged the jury explicitly "by premeditation and deliberation is meant the forming of a design, a purpose, weighing it in the mind, thinking it over, deliberating upon it, turning it over in the mind, as it were." There was no exception to this nor to the definition of malice, or any other part of the charge as to these prisoners except the following: "If you find any of the defendants guilty of murder in the second degree, because only one defendant could be guilty of murder in the second degree."

This assignment of error is defective, because it is a mere paragraph taken out of a longer sentence, but taking the whole sentence to make it intelligible, it reads as follows: "If you find the defendants guilty of murder in the first degree, then your verdict will be guilty of murder in the first degree; if you find any of the defendants guilty of murder in the first degree, you will specify, of course, which one; if you find any one of the defendants guilty of murder in the second degree, because only one defendant could be guilty of murder in the second degree."

It is transparent that there was a typographical error in omitting before the word "because" in the last paragraph, "You will specify, of course, which one." Otherwise, the sentence excepted to is insensible. If error, this was error in favor of the prisoners.

The only other exception to the charge is to the following: "The State contends, therefore, that you should find from the evidence, beyond a reasonable doubt, that he (Walter Cain) was a party to the common purpose and design entered into by all of them, that they do injury or death to Easter." Walter Cain was acquitted. Neither of the defendants, except Walter Cain and John Hicks, went upon the stand, both of whom were acquitted.

The judge properly instructed the jury that there was no evidence of manslaughter. He might have gone further and told them that there was no evidence of murder in the second degree, for upon this evidence of a concerted attack simultaneously made with firearms, late at night, upon Riley Easter and the house, by the prisoners firing simultaneously, and approaching in a body, taken in connection with the threats and the preparation of weapons, if believed, there could only be one question—the identity of the parties. But the judge left to the jury the question as to whether the killing was murder in the second degree, but charged that if it "was by premeditation and deliberation and malice, done in pursuance of a common design entered into, common enterprise entered into by all of them, after it had been premeditated and deliberated upon by them, and they did it with malice, then they would be guilty of murder in the first degree."

The evidence against the prisoners was fuller and more complete than above set out, but sufficient is recited to point the exceptions taken. The law is thus clearly stated in a recent case by *Brown, J., S. v. Walker,* 173 N. C., 782: "Premeditation and deliberation, like any other fact, may be shown by circumstances and in determining as to whether there was such premeditation and deliberation the jury may consider the entire absence of provocation, and all the circumstances under which the homicide is committed. *S. v. Roberson,* 150 N. C., 837; Carr on Homicide, sec. 72. If the circumstances show a formed design to take the life of the deceased, the crime is murder in the first degree. This subject is so fully discussed in the many cases in our reports that it is useless to pursue the matter further." The facts were carefully stated to the jury, and the law laid down according to the precedents. It would be difficult to find any set of facts which, if believed by the jury, would more completely constitute malice, premeditation, and deliberation than those testified to in this case, and which the jury found to be true under the charge of the court.

In the oral argument here counsel for the prisoners presented objections to the charge, which are not set out in the exceptions taken on the trial or in the assignments of error. In a matter of this importance it may be that if exceptions of importance were omitted by oversight the Court would, by amendment, allow the assignment of error to be entered here, but we have examined the alleged errors and find no merit in them.

After the fullest consideration of the evidence and the charge, and the argument of counsel, we find in the conduct of the trial nothing prejudicial to the rights of the prisoners.

No error.

ALLEN, J., concurring in result: I think there are several errors in the charge as it appears in the record, but they are not excepted to, presumably because the charge was not transcribed correctly by the stenographer, and as there is no error in the exceptions taken, and it appears to me that the prisoners began firing simultaneous when the deceased appeared at the door of his house, and could have had but one intent, and that was a common purpose to kill. I agree to the judgment of the court. As I read the record the question in controversy was one of identity, and that has been decided against the prisoners under instructions which are free from criticism on the controverted issue. I do not wish to animadvert on the judges of the Superior Court, knowing as I do the many duties they have to perform, but they owe it to themselves and to the public to scrutinize the records we are called on to review.

In this case the judge is placed in the attitude of charging that the burden was on the defendants to show matters in mitigation beyond a reasonable doubt, when he doubtless charged "not beyond a reasonable doubt, but to the satisfaction of the jury." This was not excepted to.

In another case at this term one of the most learned judges on the Superior Court bench appears to have held that the vendor of personal property has a vendor's lien for the purchase money which deprived the vendor of his personal property exemption as against the purchase money, because he signed a judgment hastily for the accommodation of parties, not knowing the question was raised.

Much of the difficulty about records arises from the extension of the statutory time for making up the case on appeal, and while I would not favor withdrawing from counsel the right to extend the time by consent, I am of opinion a rule ought to be adopted that there shall be no further extension of the time entered upon the record without the written approval of the judge, before whom the action is tried, as in this way he may have the opportunity of settling the case before he has left the district or has overlooked many of the incidents of the trial.

STATE v. SAM MARKS AND GEORGE FARMER.

(Filed 19 November, 1919.)

Criminal Law—Assault upon a Woman—Consent—Kidnapping—Evidence—Statutes.

Where a man, over eighteen years of age, takes a woman, also over eighteen years of age, in an automobile, away from the home of her relatives, without their knowledge, and in whose care she was living, and knowing that the girl was an imbecile and had not sufficient mind to protect herself, had carnal knowledge of her, it is sufficient for conviction of an assault upon a woman, irrespective of the question of her consent. *Semble*, this would be sufficient for conviction of kidnapping under Rev., 3634, or of a greater offense.

APPEAL by defendants from *Bond, J.*, at August Term, 1919, of HALIFAX.

The defendants were indicted under Rev., 3634, on a charge for kidnapping one Annie Smith, and were convicted of an assault upon a woman. They were sentenced to jail for a period of 15 months and 10 months, respectively, with authority to the county commissioners to work them upon the county roads, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

C. C. Peebles and George C. Green for defendants.

CLARK, C. J. It appears from the State's evidence that Annie Smith, the girl alleged to have been kidnapped, is something over 25 years of age, and so mentally deficient as to be commonly called an idiot. Her parents were dead, and she lived with two unmarried uncles, near Roanoke Rapids. About 30 July, 1919, the defendants, in an automobile, came to the Smith house ostensibly to get cider, and carried her off about 12 o'clock, and brought her back about 4 p. m. The defendant Marks was over 18 years of age, and married, and Farmer was 38 years of age.

There was evidence that while they were in the car one of the men was seen to have his arm around the girl; that Marks and the girl got out of the car and went into a thick piece of woods and stayed awhile; that Farmer was seen lying on the back seat of the car with his head in the girl's lap, and when they came back Farmer jumped out of the car and ran, and one of the uncles met Marks at the door and beat him with his gun. The court charged the jury correctly in the language of the statute as to what constituted kidnapping, and stated the contentions of the State and the defendants. He charged the jury: "If these men went to the house, knowing the girl had not sufficient mind to protect herself, with the intention to decoy her away from home, to take her off in the woods, and improperly treat her, that in itself would be such a fraud upon her as would make it immaterial whether she consented to go out or not," and would constitute such a fraud as would meet the requirements of the law as to the crime of kidnapping.

The court charged fully upon the crime of kidnapping, and then added: "If the jury find beyond a reasonable doubt that either defendant, knowing the girl to be an idiot, took her away from home, not with a fraudulent intent, but to deprive her natural protectors of her custody and to keep and to restrain her at a place where they could not get her, they could find the defendant guilty of assault upon a woman, he being at the time more than 18 years of age. If either of the defendants did not carry her away and did not aid, abet, or assist the other in carrying her away, the one so taking no part in the matter would not be guilty of anything." The jury found both defendants guilty of an assault upon a woman.

The evidence was amply sufficient to carry the case to the jury. "To constitute the offense of kidnapping, it is not necessary that actual physical force should have been employed. It is essential only that the taking or detention should be against the will of the persons kidnapped. . . . In determining whether the person was coerced by fraud and inveigle-

The defendant was convicted of secret assault upon an officer, J. W. Cole, and from the judgment of fifteen years confinement at hard labor in the State Prison, upon such conviction, appealed to this Court. Randolph Stephens was tried upon the same bill of indictment, at the same time as the defendant. He was convicted and sentenced to four years imprisonment, but did not appeal.

On the afternoon of 30 January, 1919, the defendant, with Randolph Stevens, went to Burke County and obtained a quantity of whiskey, eight or ten gallons, which they brought back with them in an automobile to Gaston County. As they returned home that night, about 8:30 o'clock, they were stopped by J. W. Carroll, sheriff of Gaston County, and his deputy, J. W. Cole. As soon as they were discovered by the officers, they jumped out of the car and fled. Later in the night the officers, having recognized both of the parties, went to the house of Stevens in search of them, about eleven o'clock, for the purpose of arresting them, as they had the liquor for sale contrary to law, as Bridges admitted several times. The sheriff approached the house from the front, while J. W. Cole, alone, went around to the east side of the house towards its rear door. After turning the east end of the house, he suddenly saw, in the darkness, a man looming up before him. He had his pistol in his right hand, pointing downward at the time, while in his left he carried a flashlight. Lifting his left hand he flashed his light and saw that the man in front of him was Stevens, while just behind him was the defendant Bridges, with a gun pointing directly at the prosecutor. Immediately upon the flash of the light Bridges fired directly at the head of Cole, the shot taking effect in his face, and destroying the sight of one of his eyes. He, in his testimony, gives this account of the shooting:

"I started to the back door, and as I turned the corner of the house I had a flashlight in my hand, and saw Stephens, and right by his head a gun and a flash. That flash was just as soon as I turned the corner. I saw Jack Bridges. He had a gun and had it up to his shoulder like that (indicating). I had not stopped—just as soon as I turned the corner this firing took place. I did not know anybody was there prior to the time I turned the corner. My face was shot up; got three shot in the corner of one eye and lost that eye; was wounded in one hand; stayed in the hospital about three weeks; don't know how many shot I had in my face and nose; my nose was crushed from here down (indicating); I lost the forefinger on my right hand; thumb was mashed and broken up a little. I was knocked down; didn't hear the shot, but was conscious about the time they got me up. The manner in which my right-hand finger and thumb got wounded, I suppose I had them up here (indicating). My pistol is not here; it is at the jail. I had a searchlight in my left hand, and the pistol in my right hand. Bridges had a shotgun.

He looked to be about 7 or 8 feet from me at the time of the flash of the gun. I was not conscious of the presence or purpose of defendant, Stephens, before the flash. When the gun flashed, Stephens looked to be about 6 feet from me, and it looked to me that Bridges was just about the length of the gun behind him. Stephens had a shotgun in his hand. (Pistol is handed witness.) This is the pistol I had that night; had it in my right hand, and the flashlight in my left hand. The defendant Bridges fired the shot from the shotgun; I do not know how many shots he fired. I saw Bridges fire that shot. The shot damaged the pistol; knocked the cylinder to one side; can't work it at all. You can see shot print all over here. (Exhibiting the pistol to the jury.) I did not attempt to shoot either one of these defendants at this time; I did not raise my pistol in any way for the purpose of shooting either of these defendants."

The sheriff, J. W. Carroll, testified in regard to admissions of defendant Bridges as follows:

"On the night he was arrested, and just after his arrest and after the handcuffs were put on him, when we started back to Shelby, I just looked around and put my flashlight on him to see if I knew Bridges, and said: 'Jack, how come you to shoot him?' 'I don't know how come me to shoot him.' 'Too much mean liquor.' "

The sheriff afterwards saw him in the Charlotte jail, and in regard to this testified:

"I spoke to him in the jail; he asked how Mr. Cole was; I told him he was getting some better, and he said, 'I'm glad of that.' I asked him about the shooting. He said he shot and then ran; that Stephens was standing right in front of him; he told me about his trip."

When the sheriff was bringing him from Charlotte to Gastonia for the trial, "he opened up and commenced talking about it; on the night he was arrested he said he did not know who had been shot until he read it in the papers, and said he didn't know how he came to do it; I think that was the statement." He told the witness, J. M. Kendrick, that he would not have shot Cole if he had not been drinking.

Bridges' codefendant, Stevens, told the sheriff that Cole came around the corner running—came to the corner, and made about two steps; as he came around the corner he, Stevens, was standing about at the bottom step with his gun in his hand, and Cole had a pistol this way (indicating), down at his side; and just as the gun fired, his hand got up to his face, his pistol in it, as though to protect his face. Cole did not make any effort to shoot. The pistol was in his right hand, and he threw it up to his face as the gun fired.

That night, after the two defendants had escaped from the automobile, they made their way to the back of Stevens' house, where they discovered that the sheriff, with his posse, was looking for them to arrest them. Then they went off, and after Bridges had secured a double-barrel shotgun for himself, and a single-barrel one for Stevens, they returned to Stevens' house, Bridges saying "that he did not aim to be arrested, and the first man that sticks his head in the door will get it shot off, and there is nobody coming in here after me. I'll shoot the first man that comes in here." There is much evidence in the case, but this recital of it will be sufficient, at least, for the present.

Defendant Bridges requested that certain instructions be given to the jury, which will be noticed hereafter.

There was a verdict and judgment against the defendant Gilton, or "Jack," Bridges, and he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. M. Hoyle and W. A. Self for defendant.

WALKER, J., after stating the facts as above: There are numerous exceptions, and we will consider them in the order of their statement in the record, grouping those relating to the same subject.

1. We are unable to see how the testimony of J. W. Cole, one of the officers, as to his shooting at the tires on the wheels of the automobile in which the defendants were riding, and in which they had the whiskey, prejudiced the appellant. The defendants did not stop the car when ordered by the officers to do so, and Cole fired his pistol, not to injure them, but to frighten them so that they would stop and not escape from the officers. It was a part of what occurred when the officers were trying to arrest the defendants, and even if not strictly relevant, it was only harmless.

2. The evidence as to the confessions of Bridges, while in custody of the officers, was clearly competent. The court carefully inquired into the facts, and found that there were no promises to induce Bridges to confess, and no threats to extort or coerce a confession from him, and that they were voluntary. The mere fact of his being under arrest did not render them incompetent. We have frequently held that confessions are competent where there were no inducements held out, and no intimation or threats to elicit them, even though the defendant was, at the time, in the custody of an officer or in prison. *S. v. Bohannon*, 142 N. C., 695; *S. v. Bowden*, 175 N. C., 794.

3. The motion to nonsuit was properly overruled, as there was ample evidence to sustain a conviction, and this is also true as to the prayer to instruct that upon all the evidence the jury should acquit Bridges. The special ground upon which this exception was based is that there is no evidence of the secrecy of the assault on J. W. Cole, the officer. The

language of the statute (Rev., 3621) is that if any person shall maliciously commit an assault and battery, with a deadly weapon, upon another by waylaying, or otherwise, in a secret manner, with intent to kill such other person, he shall be guilty of a felony. It is not essential to a conviction, under this statute, that the assault shall be committed by waylaying alone, as it is not the only kind of secret assault contemplated by the Legislature, but the assault may be committed in any other secret manner. In *S. v. Jennings*, 104 N. C., 774, the judge gave an instruction to the jury, where the element of secrecy was really not as pronounced as it is in this case, that if the attack was made in such a way as to prevent Lowry (the prosecutor) from seeing who was making the attack, or from repelling it, then that was a secret assault, and if the jury found also that defendant made the assault with a deadly weapon and with intent to kill, and was actuated by malice against the prosecutor, they would return a verdict of guilty of the felony as charged. This Court, on appeal, approved the charge as proper in itself, and as a correct qualification of the one requested by the defendant, which was to this effect, that the statute includes those assaults and batteries which are committed in such a manner as tends to conceal and keep from the public the identity of the assailant, and thereby evade the law and escape punishment, but does not embrace an assault made without any attempt to conceal his identity, though the person assaulted may be taken at a disadvantage and stricken without notice. And the Court held generally that the statute embraces assaults made upon one who has no notice of the purpose or presence of the assailant, though it may be in a public place and in the presence of others, without any attempt on the part of the assailant to conceal his identity, as well as assaults made by lying in wait, or in such manner as tends to conceal the identity of the assailant. In the later case of *S. v. Patton*, 115 N. C., 753, the language of the Court in the *Jennings case* was modified, corrected, or explained, in this way: "Though some expressions which were used *arguendo* in that case (*S. v. Jennings*), one of which is quoted in *S. v. Shade* (115 N. C., 757), at this term, may have been misleading, the only point really settled was that where one steps up stealthily behind another and stabs him without warning, it is as much an assault committed 'in a secret manner' as where one lies in ambush and shoots another." In the subsequent case of *S. v. Harris*, 120 N. C., 577, 579, the Court, after referring to the *Jennings* and *Patton cases*, holds that the assault is a secret one, within the meaning of the statute, "if it is made from behind, and in such a manner as to prevent the prosecutor from knowing who his assailant is, and that the blow is about to be stricken," and this, no doubt, was intended to be the ruling in the *Jennings case*, and it is so explained, as we have said, in the *Patton case*. In the still more recent case of *S. v. King*, 120

N. C., 612, it was said that the statute under which the defendant was indicted is highly penal and must be strictly construed. "This Court," it was further said, "held that an assault cannot be said to have been made in a secret manner, except where the person assaulted is unconscious of the presence as well as of the purpose of his adversary," citing *S. v. Gunter,* 116 N. C., 1068, where *Justice Avery,* who wrote the opinion in the *Jennings case,* adopts the rule of the *Patton case,* in which he had corrected what was stated in the *Jennings case.* But, without further attempting any comment on the *Jennings case,* as originally written, and as afterwards explained and limited, we are sure that in this case, under the rule as stated in the *Patton, King,* and *Gunter decisions,* there is ample evidence of a secret assault, even under the restricted principle of the last three cases, and that the charge of the court, based thereon, was in every respect correct. We might go further and hold that here there was evidence of waylaying, or of the appellant's actually concealing himself, by lurking under cover of darkness in the rear of the Stephens house, with the intent and with the premeditated purpose of attacking the prosecuting witness, J. W. Cole, covertly and stealthily, without any warning of his presence, and with a suddenness which deprived Cole of all opportunity to defend himself against the threatened and deadly assault. He had no time even to raise his pistol in defense of himself. The defendants were waiting in the dark for him, as much concealed as if they had been hidden in ambush, prepared to slay without a moment's warning to their victim, who was thus unexpectedly confronted by this hitherto unseen peril. J. W. Cole describes the situation in such way as to show conclusively, if his testimony was truthful, that he was so surprised that he was instantly rendered helpless because he did not know of the presence of the defendants behind the house, as they were hidden by the darkness. As was said, "they loomed up before him" with a suddenness of an apparition; and he first saw them when the gun flashed. It was too late then for any defense, as there was no time for thought. He was on his way to the back door of the house, expecting to enter the house there, and not to meet with the defendant, armed with a deadly weapon and fully prepared to kill any one who had come to take him, and who had avowed, against the protest and entreaty of others not to pursue that course, that the officers should not arrest him, and that the first man who attempted to do so would have his head shot off. This case is very much like that of *S. v. Knotts,* 168 N. C., 173, for there the officers were searching for the defendants, "who were concealed in the darkness behind a house, when they opened fire, and Moore (one of the policemen) fell at the first shot, before he knew they were there, or had any opportunity to defend himself. This case falls obviously within the intent and spirit of the statute, and also within its very letter. The attack was made under the cover of darkness and the defendants were as effectually concealed as if they had been lying in wait in an ambush." We held that there was evidence of a secret assault under the statute. To the same effect is *S. v. Whitfield,* 153 N. C., 627, which also resembles this case in several respects. The defendants there had dynamited the house of one Everett Hamilton, who, as a detective for the chief of police, had reported them for selling liquor. It was held that the evidence was sufficient to be submitted to the jury, upon the indictment for a secret assault. We have dwelt upon this exception, because the learned counsel placed the stress of his able argument upon it, and pressed it with great confidence, but it cannot be sustained, as we regard the evidence in this record as stronger than was that in the other cases we have cited.

The testimony as to the violation of the statute against the sale of liquor was harmless. There was not, and could not be, any controversy as to the defendant's guilt in this respect. He was caught "red-handed," as it is sometimes expressed, or *flagrante delicto.* He ran into the officers, so to speak, loaded with the forbidden goods. He voluntarily admitted his guilt, and his repetition of it can hardly be considered, under the circumstances of this case, as any more than harmless surplusage. They left the automobile and fled from the officers, because of their manifest guilt. We are not implying that the evidence was not, in itself, competent. It is not necessary to go beyond what we have said.

The prayers for instructions were given so far as they were proper. The first request was properly refused, as there was evidence of guilt. In regard to the second and third requests, as to self-defense, the judge explained fully, clearly, and correctly what would render Bridges faultless and entitle him to his right of self-defense. He then charged the jury as follows: "If, then, you find from the evidence that Bridges was himself without fault, and you further find from the evidence that the prosecuting witness, J. W. Cole, went to the home of Stephens for the purpose of arresting the defendants for a misdemeanor previously committed, and that he did not have at that time in his possession a warrant for the arrest of the defendants, and you further find that the witness Cole, after going to the house, intentionally and purposely pointed his pistol at the defendant Bridges, and that Bridges, under these circumstances, apprehended and had reasonable grounds to apprehend either that he was in danger of great bodily harm, or in danger of the loss of his life, you will then find that he had a legal right to use such force as was necessary, or apparently necessary, to repel the assault of Cole and protect himself, and the necessity of doing so was real or apparent; this is to be determined by the jury, viewing all the facts and circumstances as they reasonably appeared to Bridges at the time the shot was fired." The charge of the court was carefully prepared and covered every question in the case upon which instruction by the judge to the jury was necessary, and was free from any error. We might go further and say that it was exceedingly fair to the defendant, and, perhaps, was more lenient to him than he had any right to expect. It was, at least, not more unfavorable to him than it should have been, and did not fail to give him the benefit of every principle in law to which he was entitled. The doctrine of self-defense was liberally stated in his behalf in view of the facts and circumstances of the case.

Finding no error, after a patient and careful investigation of the record, we affirm the judgment, and it will be so certified.

No error.

P. C. The motion for a *certiorari* is denied. The pistol was competent evidence for the jury to consider, and it was before them, but we do not pass upon facts, and it would not aid us at all in deciding the case.

Motion denied.

STATE v. J. W. PREVO.

(Filed 26 November, 1919.)

1. **Municipal Corporations—Cities and Towns—Ordinances—Statutes—Taxation—License—Criminal Law.**

   Upon the prosecution of a criminal action for the violation of a city ordinance, Rev., 3702, the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant.

2. **Indictment—Warrant—Form—Waiver—Criminal Law.**

   Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants.

3. **Municipal Corporations—Cities and Towns—Statutes—Ordinances—Legislative Control.**

   Except when restricted by constitutional provision, municipalities, in the exercise of their governmental functions, are subject to almost unlimited legislative control, and a town ordinance in violation of a valid State statute on the same subject-matter is void.

4. **Taxation—License—Municipal Corporations—Cities and Towns—Classified as to Population—Census—Statutes.**

   Where a statute classifies the cities, towns, or other subdivisions of the State by population, such classification, unless otherwise specified, is to be determined by some "official enumeration officially promulgated," and in the absence of a State statute appertaining to the subject, or some authoritative municipal regulation, the Federal census is usually adopted and allowed as controlling.

5. Same.

Our statute, Revisal, Acts of 1917, ch. 231, sec. 28a, regulating the amount of license tax to be charged for moving picture and vaudeville exhibitions in accordance with a stated classified population of towns, refers to the Federal census in use at the time, and a city ordinance of one of these towns which, by an unofficial or without a legally authorized enumeration of its inhabitants, places a higher license tax on these shows than is authorized under the Federal census report, is void, the amount to be collected being such as is shown by the Federal census, when no official or legally authorized method is otherwise provided.

6. Same—Protest—Void Ordinances—Criminal Law.

Where a city or town ordinance imposes a license tax on a moving picture exhibit or other lawful enterprise in excess of that permitted by statute, and refuses to license such enterprise upon tender of the lawful tax, it is not necessary that the enterprise should have paid, under protest, the tax demanded for it to successfully defend itself under indictment for failure to have obtained the license. Rev., 3702.

CRIMINAL ACTION under section 3702, Revisal, for violation of ordinance of the city of Thomasville, in exhibiting a moving-picture show without license and without paying the tax as required by said ordinance, heard on appeal from recorder's court before *Bryson, J.*, and a jury, at July Term, 1919, of DAVIDSON.

The warrant on which the trial was had is in form as follows:

"Whereas, complaint has been made this day, on oath of Ira T. Johnson, city manager, that J. W. Prevo, on and after the 1st day of July, 1918, with force and arms, at and in said county, and within the corporate limits of the town of Thomasville, did unlawfully, willfully, and feloniously operate a moving-picture and vaudeville house without having procured city license thereof contrary to the statute in such cases made and provided, against the peace and dignity of the State, and in violation of the town ordinances, section Special Taxes," etc.

Plea of not guilty.

There was evidence on the part of the State tending to show that defendant conducted a moving-picture show in the town of Thomasville in 1918, and for the period after 31 May of said year, without having procured license as required by ordinance. That the license tax paid by him for previous year, and which expired 31 May, had been $30. The State and county, same tax. That the city government having raised the license tax to $60 for 1918-19, the city mayor demanded this amount of tax. Defendant refused to pay, tendering $30, the amount paid by him for the previous year, which was refused by the city. For this year also the State and county collected each $30 license tax as in the previous year.

The city ordinance, passed in June, 1918, and which was put in evidence, requires persons upon whom a license tax was imposed to procure city license, and imposed a tax for 1918-19 of $60 for same. There was also evidence on part of State that in latter part of August, 1918, Mr. John Hauss, the superintendent of city graded schools, had of his own motion, and without any formal authority, undertaken to take the census of the city, and ascertained, according to his estimate, that there was then in Thomasville a white population of 4,400. That at the same time a witness named Mr. J. E. Boykin, principal of colored graded school, undertook the enumeration of the colored residents in the city, and ascertained that there were then 770 colored people in the city limits. These added together making the city population at said date, the latter part of August, 5,210.

On cross-examination, Mr. Hauss stated that in making his enumeration of the whites he had included "500 children who were at the orphanage in Thomasville, and also the children who had gone off to school"; stating also that the children at the orphanage were a floating population, leaving the city on a rule when they reach a certain age. The witness also stated that there were a good many families who move into Thomasville to work in the factories, and going back to the farms at the usual time. It was also shown that by the last Federal census, the only authorized enumeration of the population of Thomasville, the number of people were given to be 3,877.

The court being of opinion that on the evidence, if accepted, the defendant was guilty, so instructed the jury, who rendered a verdict of guilty. Judgment on the verdict; defendant excepted and appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Howell R. Kyser for defendant.

HOKE, J., after stating the case: In order to a legal conviction on a charge of this character, it is incumbent on the State to establish that there has been a violation of a valid ordinance; ordinary defects in the form of the warrant may be waived, and usually are waived by the general plea of not guilty, but charged with a misdemeanor in violating a town ordinance. A valid ordinance must be shown or the prosecution necessarily fails. *S. v. Snipes,* 162 N. C., 242; *S. v. Hunter,* 106 N. C., 796. On this question, the State statute applicable, Rev., Acts 1917, ch. 231, sec. 28 (a), makes provision as follows:

"On each room, hall, or tent used as a moving-picture or vaudeville show, a tax as follows: In town of less than one thousand five hundred inhabitants, ten dollars per annum; less than five thousand inhabitants and more than one thousand five hundred, thirty dollars per annum; less than ten thousand inhabitants and more than five thousand, sixty dollars per annum; in towns or cities with more than ten thousand inhabitants and less than fifteen thousand, one hundred dollars per annum; more than fifteen thousand inhabitants, one hundred and fifty dollars per annum. Counties, cities, or town shall not levy a greater amount of license tax than that of the State."

The same provision appears in the Laws 1915, and with a less amount of tax in 1913, etc.

It is well understood that municipalities, in the exercise of their governmental functions, are subject to almost unlimited legislative control, except when restricted by constitutional provision. And it is uniformly held that a town ordinance in violation of a valid State statute appertaining to the question is void. *Trustees v. Webb,* 155 N. C., 379; *S. v. Beacham,* 125 N. C., 652; *Shaw v. Kennedy,* 4 N. C., 591; 19 R. C. L., 803, and cases cited.

The generally accepted rule is that in statutes of this character, classifying the cities, towns, and other subdivisions of the State by population, that the classification, unless otherwise specified, is to be determined by some "official enumeration, officially promulgated," and in the absence of a State statute appertaining to the subject or some authoritative municipal regulation, the Federal census is usually adopted and allowed as controlling. The principle was approved in the New Jersey Court *In re city of Passais*—sewer construction, 54 N. J. Law, 156, where it was held, "That an act for the classification of cities of the State for the purpose of municipal legislation in relation thereto 'means population as determined by' an official enumeration officially promulgated," and *Justice Magie,* in the opinion, speaking to the question, said:

"The act for the classification of cities, above cited, fixes the grade of cities of the first, second, and third class by 'population.' How the population of any city is to be ascertained is not expressly declared. The contention is that population may be determined, like any other fact, by evidence, and that, when it thus appears that a city of the third class has acquired a population exceeding 12,000, it must be judiciously declared to be no longer a city of the third class, but one of the second class. If the question thus presented was limited to the construction of the original classification act, I think its solution not difficult. Neither parties litigant, nor municipalities, nor courts, have been empowered to make enumeration of inhabitants for the determination of the population. Any attempted enumeration, not accompanied with power to inquire and compel answer, would be a mere farce. The fact determined in one case in one way might be determined otherwise in another case. It is inconceivable that the Legislature intended to make classification depend upon such uncertainties. It is apparent that population in this act bears the meaning of enumeration of inhabitants, and refers to such enumeration as the law provides to be made. Two such enumerations are provided for by law in each decade—one under United States authority, and the other under the laws of this State.' "

And as suggested here by this upright, wise, learned judge, any other principle would be productive of such uncertainties in the administrative measures affected as to be entirely impracticable.

There could be no better illustration of this position than by reference to the facts of this present case. Mr. Hauss, who attempted the enumeration, known to the writer to be intelligent and reliable, no doubt did all that could be done in such an effort, but he had no official rule to guide him; he had no assurance of correct answers to questions he might be called on to ask; in fact no means of compelling any answer at all. With the directness and candor to be expected from him, he says that in taking the number of the white population, which was all that he personally attempted, he included several hundred orphan children then in the town, or the orphanage there situated, a floating population. He included also numbers of citizens who had temporarily moved in from the country. The colored population was reported to him by an assistant, and what methods were pursued in reference to these is not shown. With all of these limitations and drawbacks, he was only able to report a population of 5,210, and this in the latter part of August, more than two months after the ordinance was enacted.

On reason and authority, therefore, we are of opinion that such an enumeration should not be allowed to affect the question; that it is neither competent in law nor sufficient in fact to justify a departure from the Federal census—the only authorized and official census extant at the time and to which the Legislature undoubtedly referred in the enactment of the statute.

This being the rule, and the Federal census showing that at the time of the enactment of the ordinance in question the population of Thomasville was only 4,877, the city was without power to levy a tax in excess of $30, the amount collected by the State and county, and the ordinance by which it was attempted to collect a tax of $60 is void.

The State does not contend that this conviction should be upheld, but submitting the matter to the judgment of the court, and prompted by the laudable desire to aid the court only to a correct conclusion, the Assistant Attorney-General, on the argument, frankly stated that he had been unable to find any good reason to justify the action of the town of Thomasville in the case. The endeavor to enforce collection of a tax of $60 when the State and county taxes only amounted to $30 allowed by the statute.

It is suggested, however, that the defendant should have paid the tax under protest, and was not justified in going on with his exhibit without the city license. If this were a valid ordinance and the question were whether same applied to defendant's business, or whether the authorities were justified in refusing a license, the position would be unchallenged. Such a position was approved by the Court in *S. v. Snipes, supra,* but the prosecution being for violation of an ordinance, there must be a valid ordinance, or, as stated at the outset, there is nothing upon which the prosecution may rest. To hold that an amount required by an unreasonable or void ordinance should be paid or tendered before a business, otherwise lawful, can be entered on would enable a municipal government by an exorbitant tax to arbitrarily suppress any business within its limits, however worthy or desirable. Nor can it be insisted that doing business without license is prohibited regardless of the amount of the tax, on the ground that the two are separable. This being a business expressly recognized and approved by a State statute, the town is without power to prohibit it. *S. v. Taft,* 118 N. C., 1190. The entire, and, assuredly, the chief end and purpose of the ordinance is to raise revenue, and the authorities having framed an ordinance requiring a tax in excess of the amount allowed by statute, the whole regulation must be declared void. *S. v. Webber,* 107 N. C., 962. In this case it was directly held, among other things: "That if part of an ordinance is void, all other clauses with which the invalid part is reasonably connected, or which are dependent on it, are also void."

For the reasons stated, we are constrained to differ with the learned judge in his disposition of the case, and on the facts as now presented are of opinion that the defendant is entitled to an acquittal.

Reversed.

STATE v. JAMES REID.

(Filed 26 November, 1919.)

1. **Criminal Law—Arson—Accessory—Trials—Principal Felon—Statutes.**
One count in a bill of indictment charged the defendant with arson, and another thereof as accessory before the fact in procuring a certain other person to commit the crime, such other person being under separate indictment for arson and awaiting trial at the time of the trial of the present defendant. At the present trial the solicitor consented to a verdict of not

guilty under the first count, and defendant was convicted as an accessory before the fact under the second one: *Held*, objection that the alleged principal felon had not then been tried or called upon to plead, is untenable under the provisions of our statute, Rev., 3287.

2. **Criminal Law—Evidence—Hearsay—Husband and Wife—Statutes—Appeal and Error—Reversible Error.**

Upon the trial of the defendant for accessory before the fact for arson, there being evidence that the defendant paid the alleged principal felon money to procure him to commit the crime, testimony of the defendant brought out on his cross-examination, and under his exception, that the wife of the alleged principal felon sent the prisoner word through the prisoner's wife, not to speak of the transaction, as it would not be good for him, is hearsay, and further incompetent under Rev., 1634 and 1635, forbidding the wife to testify in such instances to her husband's hurt, when not made in his presence or by his authority; and the admission of such testimony is prejudicial and reversible error.

3. **Evidence—Hearsay—Criminal Law—Arson—Motive—Character—Appeal and Error—Reversible Error—Witnesses.**

Upon the trial of defendant as accessory before the fact of arson, written or printed notice to the defendant which had been served on him, was put in evidence under his objection, signed by the owner of the house and other influential neighboring landowners, forbidding the defendant and his wife to go upon their lands under the penalty of the law. *Held*, though it was introduced and admitted as to the owner of the burned dwelling, this "notice" did not sufficiently tend to show defendant's motive, and, otherwise, it was hearsay, and being highly prejudicial to the defendant, constituted reversible error, having the natural effect to throw into the jury box the unsworn estimate of influential property owners that the defendant was an undesirable neighbor and citizen.

CRIMINAL ACTION, tried before *Shaw, J.*, and a jury, at Spring Term, 1919, of ANSON.

Defendant was indicted for crime of arson of a dwelling, tenement house, owned by R. F. Bennet, and occupied by John McLendon and family, a tenant on the owner's farm. A second count charged that the house was burned by one Tom Simons, at the instigation and procurement of defendant, the count being formally as an accessory before the fact to the principal crime.

During the progress of the trial, with consent of the solicitor, a verdict of "Not guilty" was entered on the first count, and the issue was submitted as to the guilt of the defendant on the count charging him with being accessory before the fact. There was a separate indictment against Tom Simons, preceding the charge against defendant, which had not been tried or disposed of.

There was verdict of guilty of the crime of accessory before the fact. Judgment, and defendant excepted and appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. A. Tarlton and Stacks, Parker & Craig for defendant.

HOKE, J. There is no merit in defendant's first objection that his cause was tried before that of Tom Simons, the alleged principal felon, and before said Simons had been called on to plead. The course pursued comes directly within the broad provisions of the statute controlling the subject. Rev., 3287, enacting, among other things, that "on a charge of being accessory before the fact, defendant may be tried with the principal felon or after his conviction, or may be indicted and tried for a substantive felony, whether the principal shall or shall not have been convicted, and shall or shall not be amenable to Justice," etc., and authoritatively approved in *S. v. Stephens,* 170 N. C., 745, and other cases. On careful consideration, however, we are of opinion that the defendant is entitled to a new trial by reason of certain errors in the ruling of the court on questions of evidence. The testimony on the part of the State tended to show that Tom Simons burned the house, and that he was instigated to do the act by defendant, who was to pay the witness $150 for doing it, and that defendant's wife had paid witness for her husband $15 on the amount promised. The record shows that this principal witness had at first and for some time denied that he burned the house or knew anything about it, and having been cross-examined in reference to these facts, in reply, the following questions and answers were admitted over defendant's objection:

Q. Now Tom, Mr. Stack asked you a little while ago why you didn't tell about this the first time the detective went to see you? A. I had word not to tell.

Q. Who told you not to tell? A. My wife told me.

Q. Told you what? A. Said Jim's wife said tell me I had better not say anything about it, it wouldn't be good for me.

There was also a motion to strike out the answer, and denied, and defendant excepted further.

This evidence, to our mind, was clearly objectionable as hearsay and highly prejudicial to defendant. Tom Simons had already testified that defendant's wife had paid him $15 on account for having fired the house, and this evidence tending as it did to show concern on the part of defendant about the charge, and an effort to shape the conduct of the witness concerning it, was well calculated to injure the prisoner in the decision of the issue. Under our statute, Revisal, secs. 1634 and 35, the wife was neither competent nor compellable to testify to her husband's hurt in a proceeding of this character and, *a fortiorari*, her declarations against him should not be received when not made in his presence nor by his authority. *Coltrain v. Lumber Co.*, 165 N. C., 44; *Redmond v. Roberts,* 23 N. C., 481; Jones on Evidence, 2d ed., sec. 297.

In this last citation the author quotes from *Chief Justice Marshall* on the subject of hearsay evidence in his opinion in *Mima Queen v. Hepburn,* 7 Cranch, 296, as follows: "That this species of testimony supposes some better testimony that might be adduced in the particular case is not the sole ground of the exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact and the frauds that might be practiced under its cover combine to support the rule that hearsay evidence is inadmissible."

Again, over defendant's objection, the State was allowed to put in evidence a written or printed notice, signed by eleven or twelve influential landowners of the neighborhood, R. T. Bennett being among them, addressed to defendant and his wife, forbidding them to go upon the land of the signers under the pains and penalties of the law, and signed and sealed by the parties.

This, too, was hearsay and of a highly objectionable character. True, this was introduced and admitted as to R. T. Bennett, the owner, and it is contended in support of its admission that it tended to show a motive for the crime on the part of defendant. But we do not think it had a reasonable tendency to show any adequate motive, and to our minds, in the form as presented, it went far beyond the necessity and justification that is claimed for it. While it is said in the record that it was introduced only as to R. T. Bennett, the entire paper, formal in style and purporting to have been served by the constable of the township, was read in the hearing of the jury, including all the signatures, and its natural effect was to throw into jury box the unsworn estimate of all these influential property owners that the defendant was an undesirable neighbor and an unworthy citizen.

For these errors, we are of opinion that defendant is entitled to have his cause tried before another jury, and it is so ordered.

New trial.

STATE v. OBE MULL.

(Filed 26 November, 1919.)

Statutes—Amendatory—Prospective Effect—Intoxicating Liquors—Criminal Law—Punishments.

A public-local law making the selling of intoxicating liquors in a certain county a misdemeanor is not repealed by a later statute, making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense; the later statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense has been committed prior to the enactment of the latter act, it is punishable under the prior law. Rev., 2832, 5455, 5456.

APPEAL by defendant from *Harding, J.,* at August Term, 1919, of BURKE.

The defendant was convicted for selling spirituous liquors to one W. T. Mace. There was evidence of a sale of spirituous liquors on 20 December, 1918, but at no other time, and there was no evidence tending to show a sale subsequent to 23 January, 1919.

There was a motion for nonsuit, which was refused, and defendant excepted. The defendant requested the court to instruct the jury that if they found that the defendant retailed spirituous liquors in Burke County prior to 23 January, 1919, and not since that date, they should return a verdict of not guilty for the reason that under the act ratified that day the offense of retailing was made a felony. The prayer was refused and the defendant again excepted, and also to the instruction that if the jury believed the evidence they should return a verdict of guilty. The jury found the defendants guilty of misdemeanor as charged in the indictment, and from the judgment thereon the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John Mull and S. J. Ervin for defendant.

CLARK, C. J. The evidence was uncontradicted that the defendant on 20 December, 1918, retailed and sold spirituous liquors unlawfully and willfully in the county of Burke. The defendant offered no testimony, was convicted and sentenced for the misdemeanor as charged.

The defendant urges that this was error because Public-Local Laws 1919, ch. 2, ratified 23 January, 1919, provided that retailing spirituous liquors in the county of Burke should be a felony. But that act was made prospective, for it provided that it should "take effect from its ratification," and that it repealed all laws in conflict therewith.

This could have no application to the offense of selling spirituous liquors in that county, which was alleged and proven to have occurred on 20 December, 1918, prior to the act. This act was prospective, by its terms taking effect only from its ratification (on 23 January, 1919), and was not in conflict with the previous act making it a misdemeanor, which was in force 20 December, 1918.

This highly technical objection may have been presented by the defendant to see "how it would strike the Court." It has more than once been before the Court and disallowed. In *S. v. Putney,* 61 N. C., 543, the Act of 25 February, 1867, punished the stealing of a mule with death. It was held that this act did not repeal the previous statute which punished that crime with a lesser punishment, and therefore did not affect a conviction for stealing a mule at a time previous to this act which increased the punishment to the death penalty.

Reade, J., says, with his usual incisive common sense: "It is insisted that the defendant cannot be punished at all; not under the statute of 1866-7, ch. 72 (ratified 25 February, 1867), because the offense was committed prior thereto, and not under the old law, because it is repealed by the new. It is true that the defendant cannot be punished under a law which was not in existence at a time when the offense was committed, because that law would be *ex post facto,* unless where it lessens the punishment. It is equally true that where a new law expressly or impliedly repeals the old law there can be no conviction under the old law. But the Act of 1866-7 does not repeal the old law, but is only prospective in its character." The act simply provided that "Any one convicted of larceny of a horse, etc., should suffer death," and recited that it was "ratified 25 February, 1867."

Judge Reade, speaking for a unanimous Court, said that it should be read as if it said: "If any person shall hereafter steal a mule he shall suffer death." This was because the act could not take effect as a matter of law as to offenses committed prior to that time unless it was expressly so stated, and even then it could not have any effect as to an increase of punishment, because such law would be *ex post facto.*

In *S. v. Massey,* 97 N. C., 465, it was held, "Where a statute only undertakes to amend one already on the statute books, it will be presumed that it did not intend to repeal it unless there is an express repealing clause," *Merrimon, J.,* saying: "The amendatory statute does not purport to repeal the statute it amends; it contains no repealing clause, and it seems to operate only *prospectively* from the date of its ratification, leaving the statute still operative as to offenses theretofore committed. It can scarcely be supposed that the Legislature intended to allow persons who had violated the statute before the amendment of it to go unpunished; if it had so intended it would most likely have incorporated into the amendatory statute an express clause of repeal."

In *S. v. Massey,* 103 N. C., 356, a divided Court held that in the absence of a saving clause the subsequent act released from liability all who had committed offenses prior to the act increasing the punishment. But *Smith, C. J.,* and *Merrimon* (later *C. J.*) dissented.

In *S. v. Perkins,* 141 N. C., 797, it was held: "Chapter 497, Laws 1905, which enacts that the sale of liquor shall be prohibited in Union County, and provides that all laws and clauses of laws in conflict with the act are repealed, and that the act shall take effect 1 June, 1905, is prospective in its operation and applies only to sales after 1 June, 1905, and does not repeal chapter 434, Laws 1903, prohibiting the sale of liquor in said county as to sales made prior to 1 June, 1905."

In that case *Walker, J.,* says: "The act of 1905 does not expressly and unqualifiedly repeal the act of 1903, but repeals it only to the extent that it conflicts with it. If the Legislature had intended to repeal the act of 1903 absolutely it was easy to express that intention in words of unmistakable meaning; but it preferred not to do so, but to repeal it only so far as it is repugnant to the provisions of the later statute. The act of 1905 is made by its very language prospective in its operation. It refers to sales made after 1 June, 1905, *when it became effective,* and could not under our Constitution apply to antecedent acts so as to make them criminal or punishable if not so at the time they were committed. If it does not affect prior acts which are covered only by the earlier statute, how can it be said to conflict with the latter as to those acts? There can be no repugnancy except as to the offenses which are punishable under the later statute, and as to these the earlier statute is repealed, and it has no further operation. Repeals by implication are not favored, and they should not be extended so as to include cases not within the intention of the Legislature."

This unanswerable argument applies to this case, where it is specified that the act is to take effect "from and after its ratification" 23 January, 1919, and therefore prospectively only. There can be no doubt of the intention of the Legislature in the present case, for the title of chapter 2, Public-Local Laws 1919, is "An act to amend the prohibition law and to provide for the better enforcement of the same in Burke County." There is certainly no intention in this, nor in the body of the act, to turn loose all those who had violated the law in force prior to the passage of the act, but to increase the penalty and to make prohibition more effective. Besides, the act does not increase the penalty or change the law theretofore in force, even as to the penalty, for it provides that "upon conviction of the first offense the defendant shall be imprisoned or fined, in the discretion of the court"; and there is no allegation or proof that this was not the first offense. It is true that it is provided that out of the fine $50 shall be taxed in favor of officers procuring the evidence against the party convicted, but that is not an increase of the punishment, which for the first offense remained as before—"fine or imprisonment, in the discretion of the court."

In *S. v. Perkins, supra, Walker, J.,* speaking for a unanimous Court, has so fully and completely stated the law applicable, affirming *S. v. Putney,* that nothing can be added. He says: "It can make no difference how the intention of the Legislature, that an act should have prospective operation, is expressed; whether it is done by unequivocal terms in the act or by a proviso, or is to be gathered from its general scope and tenor, so that it appears with sufficient clearness that such is the intention."

In this case it is clearly said that the act is to "take effect from and after its ratification," *i. e.,* 23 January, 1919, and, as said in *S. v. Perkins,* it cannot conflict with previous laws punishing the crime. "except those committed after the new act took effect."

Mr. Justice Walker, at the conclusion of his opinion in *S. v. Perkins* (p. 808) says, in language specially pertinent to the present case: "The spirit and purpose of the two acts and the object with which they were passed forbid the conclusion that the Legislature intended a repeal of the prior act. The Legislature, when it passed the second act, was apparently not in a forgiving mood. The evils of intemperance no doubt had increased and called for more stringent provisions for the future, but not for the exercise of mercy in dealing with past offenses." *S. v. Perkins,* 141 N. C., 797, is cited and approved; *S. v. Russell* (*Walker, J.*), 164 N. C., 484; *S. v. Johnson* (*Allen, J.*), 171 N. C., 801, 802; *Sanatorium v. State Treasurer* (*Hoke, J.*), 173 N. C., 810.

In *S. v. Broadway,* 157 N. C., 600, the whole subject is reviewed, discussing *S. v. Putney, S. v. Perkins,* and *S. v. Massey,* affirming the two cases first named and approving the explanation of *S. v. Massey* made by *Walker, J.,* in *S. v. Perkins,* which was as follows: "*S. v. Massey,* 103 N. C., 360, was decided upon the theory that the later statute by its very terms, and as if in so many words had unqualifiedly and expressly repealed the earlier one," saying further that in *S. v. Massey,* 97 N. C., 465, it was held, "Where a statute only undertakes to amend one already on the statute books it may be presumed that it did not intend to repeal it unless there is an express repealing clause."

In *S. v. Broadway, supra,* it was held: "Repeals by implication are not favored by the law, and an act which merely leaves it in the discretion of the trial judge to impose a longer sentence for an offense than that prescribed by a former act, without changing the constituent elements of the crime, does not repeal the former act; and a subsequent sentence for the crime committed prior to the time of the enforcement of the second act, which does not exceed the limited time of punishment prescribed by the prior act, is valid."

Revisal, 2832, provides that where a part of a statute is amended (as in this case, merely by changing the punishment after the first offense) it is not to be considered as repealed, but simply as a reënactment, except as to the new provision, which is to take effect from the time of the amendment. See cases cited under that section; and Revisal, 5455, expressly provides: "No offense committed and no penalty or forfeiture incurred under any of the statutes hereby repealed, and before the time when such repeal shall take effect, shall be affected by the repeal." To same effect, section 5456. This shows the policy of our legislation on this subject.

No error.

STATE v. PERRY KILLIAN.

(Filed 26 November, 1919.)

Intoxicating Liquor—Distilling—Evidence—Accessory—Criminal Law.

Upon trial for illicit distilling there was evidence tending to show that the defendant, on the occasion of an officer searching for a still, took his gun and fired several times in the air, and when the place was found there was no one there, and the still part had been removed, but the balance of the outfit was there, giving indication of recent use, with fire in the furnace. *Held*, sufficient to convict, the purpose of the defendant thus firing evidently being to abet the distillers and to enable them to escape, thus making him an accessory equally guilty with the principals.

WALKER, J., concurs in result; CLARK, C. J., dissenting; HOKE, J., concurring in the dissenting opinion.

INDICTMENT for illicit manufacture of intoxicating liquor, tried at August Term, 1919, of CALDWELL.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

M. N. Harshaw and W. C. Newland for defendant.

BROWN, J. The defendant is a merchant at Mortimer, N. C., and in consequence of information received by the sheriff of Caldwell County the sheriff went to Mortimer to capture a blockade distillery that he had learned was in operation near said village. Upon arrival at Mortimer, the sheriff started to find and capture the distillery that had been previously reported to him. When he had gotten some distance from defendant's store he heard a gun fire (though not at him), and he looked in the direction of the sound and saw the defendant unbreeching a shotgun, and then saw him reload the gun and fire again up in the air. This was practically all the evidence against the defendant. The sheriff further swore that he went direct to the still place and found no one there. The still was gone, but there was a fire in the furnace. The defendant was at his store when the sheriff arrived at Mortimer, and that he never saw any one at the still—never saw the defendant closer than one-quarter of a mile to the still. These statements were substantially corroborated by J. C. Eller, who was the sheriff. The State rested its case and the defendant moved the court to dismiss the action as of nonsuit, which was declined.

We think the motion to dismiss was properly overruled. We think there is some evidence sufficient to go to the jury that the defendant knew of the existence of the still and fired a gun in order to give warning to the distillers. While the evidence is not very strong, we think the jury may infer from all the surroundings as to what was the purpose of the defendant in firing the gun. If his purpose was to aid and abet the distillers and to enable them to escape, the defendant would be an accessory and equally guilty with the principals.

The court instructed the jury as follows: "Gentlemen of the jury: It does not mean that the State is required to satisfy you beyond a reasonable doubt that the defendant was that morning making that particular run, but if he had been manufacturing liquor in the State of North Carolina at any time in the last few years he would be guilty."

The defendant was indicted for manufacture of liquor and operating a still near Mortimer, and the evidence is confined exclusively to the particular occasion described by the witnesses. The only evidence offered by the State was that he fired his gun to give warning on this particular occasion. There is not the slightest evidence tending to show defendant's connection with any other violation of the liquor laws, and we think his Honor was in error in charging the jury as he did.

His Honor further instructed the jury, "That if the State has satisfied you that this man was aiding and abetting, if not himself manufacturing, it would be your duty to convict."

In that charge his Honor evidently was inadvertent to the well-settled rule of the criminal law, that before they can convict of a crime they must be satisfied beyond a reasonable doubt.

New trial.

WALKER, J., concurs in result.

CLARK, C. J., dissenting: Concurs that the motion to dismiss was properly denied. The evidence, as recited by the court in the charge, is as follows: The sheriff, in pursuance of information received, went to Mortimer to look for the still; this defendant was at his store; when the sheriff passed by the rear end of the store and turned the corner of the store he saw a gun standing there, and when he got to the next corner of the store he saw the defendant; he passed on a few steps and looking back saw the defendant go into the house, and returning with the gun, go up in the direction of the still, while the sheriff was going down a further way by the railroad; in a minute or two, or a short time, he heard a gun fire, and looking back saw the smoke and the defendant unbreaching, or breaching, his gun; the defendant was standing between the rails of the railroad track, and fired his gun again, but he was not shooting at anything; he held the gun up and fired in the air; the sheriff then proceeded to the still, which he found with the fire in the furnace, and everything as if running except that the still had been taken out and was gone. The defendant left his gun in an old house along the road, and that night he was seen to go there with a light and search around in the house and go away.

There was ample evidence justifying the court in submitting the case to the jury. It needs no authority in this State, that one who aids and abets in a misdemeanor can be convicted of the offense charged in the bill. In *S. v. Horner,* 174 N. C., 792, it is said: "It makes no difference whether defendant was a principal in the first degree, or in the second degree, as aider and abettor. The latter is but a lower grade of the principal offense, viz., the distilling and manufacturing of liquor. An aider and abettor is denominated in the books as principal in the second degree."

In *S. v. Ogleston,* 177 N. C., 542, *Allen, J.,* charged the jury: "Under this act, notwithstanding the charge is for the manufacture of spirituous liquors, you can convict either of the defendants for aiding and abetting the manufacturing of spirituous liquors." This charge was sustained by the Court.

It is assigned as error that the judge charged the jury: "Gentlemen of the jury, it does not mean the State is required to satisfy you beyond a reasonable doubt that the defendant was that morning making that particular run; but if he had been manufacturing liquor in the State of North Carolina, at any time in the last two years, he would be guilty."

I cannot concur that "the only evidence offered by the State was that the defendant fired his gun to give warning on this particular occasion." There were many additional circumstances from which the jury could infer that the aiding and abetting had existed prior to this time. The sheriff, when he went up by the rear of the defendant's store, in passing around the corner saw the gun standing there, and the defendant, who was near by, went to the house, got the gun, and went by a short cut in the direction of the still. The sheriff heard the gun fire, saw the smoke from the gun, and defendant unbreaching his gun. He saw him fire the gun again, though he was not shooting at anything; the sheriff then went to the still and found fire still in the furnace, and everything as if running, except that the still itself was taken out and gone. This evidence was sufficient to submit to the jury the question whether the defendant had previous knowledge of the illicit manufacturing of liquor, and was under an agreement to give warning of the approach of officers. If not, why did he have his gun ready at hand, and why did he go by a short cut near the distillery and give notice by firing his gun off twice, and then hide his gun and go back that night secretly to get it? To any reasonable man there can be but one inference, and that is that there was preconcert between him and the parties actually running the still, for they left the still "with the fire in the furnace, and he found everything as if running, except that the still was taken out and was gone." There was, therefore, ample evidence from which the jury could draw the inference that the defendant, within two years prior to that particular moment, had been engaged, or was aiding or abetting those who were engaged, in running this illicit distillery. This conduct was not that of a man acting on a sudden impulse. The defendant put on no evidence.

This principle that the aider and abettor, like the receiver of stolen goods, is liable as principal, is older than the common law. Those who have read the old Latin reader *Via Latina* will remember this incident copied from an historian, who wrote 2,500 years ago, at a time when those captured in battle were slain, and not made slaves (as was later the case for several centuries). Said the historian: "*Tubicen ab hostibus captus, 'Ne me,' inquit 'interficite; nam inermis sum, neque quidquam habeo praeter hanc tubam.' At hostes, 'Propter hoc ipsum,' inquiunt 'te interimemus, quod, cum ipse pugnandi sis imperitus, alios ad pugnam incitare soles.' Fabula docet non solum maleficos esse puniendos, sed etiam eos qui alios ad male faciendum incitent.*" This, briefly rendered into English, is as follows: "A trumpeter captured by the enemy said, 'Do not kill me, for I am unarmed and have nothing except this trumpet.' But the captors replied: 'For that very reason we will slay you, because when the order comes for battle, you only incite others to fight.' This teaches us that not only those who do evil should be punished, but more especially those who encourage others to do evil, should suffer."

It is also assigned as error that the court charged the jury: "If the State has satisfied you that this man was aiding and abetting, if not himself manufacturing, it would be your duty to convict," and erred in leaving out the words "beyond a reasonable doubt." This is not just to the learned judge who no less than *eleven times* in this somewhat brief charge told the jury they must acquit the defendant unless they found him guilty "beyond a reasonable doubt." The charge must be taken as a whole.

In the opening of the charge *Judge Harding* charged: "In this case you can convict the defendant for the manufacture of liquor, or for aiding and assisting in the manufacture of liquor; that is the law in this State. The burden is on the State to satisfy you beyond a reasonable doubt that the defendant is guilty." This was not only said eleven times in the charge, but the charge objected to above, with its context, reads as follows, and is the conclusion of the charge: "If the State has satisfied you that this man was aiding and assisting, if not himself manufacturing liquor, it would be your duty to convict; if the State has failed to satisfy you, *give him the benefit of the doubt and acquit him.*

"I say, as I have said so many times, a reasonable doubt does not mean any doubt or suspicion, or an indefinite, vague, visionary information you may take of it; a doubt on the part of anybody else; you should refuse to convict; but if you have such a doubt; if the evidence in this case raises in your mind, as would be raised in the mind of a reasonably thinking man when he comes to consider all the evidence in this, all the facts surrounding the situation; if you have a reasonable doubt as to the defendant's guilt, give him the benefit of the doubt and acquit him.

"If the State has satisfied you beyond a reasonable doubt, and your discretion says so, it is your duty to convict him; just as it is your duty to acquit him if the State has failed to so satisfy you. Retire and take your verdict."

Thus the instruction that the jury must acquit the defendant unless they find him guilty beyond a reasonable doubt is not only given eleven times in the charge, but three times in the immediate context following that paragraph and closing the instructions to the jury, and, in addition, as part of *the very same sentence* (which part is omitted by defendant's counsel in assigning error) the court said that the jury must give the defendant "the benefit of the doubt and acquit him."

HOKE, J., concurring in dissent.

STATE v. R. E. COLEMAN.

(Filed 3 December, 1919.)

1. **Appeal and Error—Objections and Exceptions—Instructions—Contentions.**

   Objection to a statement by the judge of the appellant's contention as being incorrect, should be made at the time, or an exception thereto will not be considered on appeal. In this case it is held that the statement, "he stated on the stand he was going for liquor," is substantially the same as "I thought we were going after liquor."

2. **Appeal and Error—Objections and Exceptions—Criminal Law—Legal Principles.**

   Exceptions that the judge should have instructed the jury upon the defendant's contentions on trial for violating the prohibition law, after he had stated them, is without merit when there is no legal principle involved beyond the doctrine of reasonable doubt, on which the judge correctly charged; and an error in an instruction upon a count in the indictment, on which the defendant was acquitted, is rendered harmless by the verdict.

3. **Intoxicating Liquors—Criminal Law—Transporting—Statutes.**

A conviction for the unlawful transportation of liquor, chapter 97, Laws 1913, cannot be sustained when the defendant was transporting his own liquor, but not for the purpose of sale, and only gave the package to his companion to take a drink.

4. **Criminal Law—Indictment—Counts—Verdict—Appeal and Error—New Trial.**

A general verdict of guilty upon several counts of an indictment will apply to each count, and when error has been committed as to some, the verdict will stand as to the others, and a new trial will not be granted.

CLARK, C. J., concurring in result.

APPEAL by defendant from *Harding, J.*, at the August Term, 1919, of BURKE.

This is a criminal action, and from the judgment upon the verdict the defendant appealed to this Court.

The indictment, upon which he was tried, charged:

(1) Possession of liquor with the purpose of sale.
(2) Receipt of more than one quart at a time.
(3) Receipt of more than one quart at a time in a single package.
(4) Transportation of the liquor.

The defendant was convicted on the last three counts, and acquitted on the first.

The evidence of the State tended to show that the defendant, on the night of 13 June, 1919, drove the witnesses Scott and Ervin, in his automobile, out south about three miles from Morganton; that after arriving at his point of destination, he left the other two in his car, while he, taking a suitcase with him, went off into the woods; that in about ten minutes he returned, having a gallon jug of corn whiskey in the suitcase; that on the way back to Morganton he handed the jug to Scott to take a drink, and while he was trying to withdraw the stopper the officers came up and arrested them.

The evidence for defendant was that Scott bought and received the liquor and not the defendant.

To the following instructions of the court the defendant excepted:

"The State contends if it has failed to satisfy you that he was the man that got the liquor, wherever it was, and failed to satisfy you he actually received it in his possession, the State contends that he was guilty of transporting it from a point within North Carolina to some other point to some person more than a quart of liquor. The State contends it has shown he got the liquor, put it in the suitcase, brought it and put it in the automobile and delivered it to Mr. Scott; that Scott took it into his own hands and tried to get the stopper out and take a drink. If the State has satisfied you of that beyond a reasonable doubt, then he would be guilty, and you should convict him on that count.

"2. He contends he had an automobile, and while he knew it was his purpose to go in the country with Mr. Scott, that he knew Scott was going after liquor, or that was his purpose in going there to get some liquor—he stated that on the stand.

"3. To the failure of the court to instruct the jury as to the rules of law which applied upon the defendant's contention in event the jury found that the evidence sustained such contention, and to the failure of the court to instruct the jury as to the principles of law which would apply upon the defendant's contention, which were given by the court, the defendant excepts upon the ground that it was useless to present such contention unless the law applying thereto was also presented to the jury.

"4. If you are satisfied beyond a reasonable doubt that he was transporting liquor from one point in this State to another point to some person, you will convict him of that."

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. C. Newland for defendant.

ALLEN, J. The defendant is indicted in the first count under chapter 44, Laws 1913, and in the second, third, and fourth counts under chapter 97, Laws 1915, and these statutes cover the several offenses charged in the indictment.

The exceptions are to the charge, and it is well to consider the second and third first, as the first and fourth instructions relate to the same count.

The objection of the defendant to the second instruction is to the use of the words, "he stated that on the stand," upon the ground it represented the evidence of the defendant incorrectly, but it will be observed his Honor was then stating the contentions of the parties, and "if contentions are not properly stated, the attention of the court should then be called to the omission so that it may be supplied." *Mfg. Co. v. Building Co.,* 177 N. C., 106, and cases cited.

If we, however, turn to the record we find the defendant testified: "I thought we were going after some liquor," which is substantially as his Honor stated.

The third exception is to the failure to fully explain the law to the jury, but there was no legal principle involved beyond the doctrine of reasonable doubt, which was correctly stated, except as bearing on the first count, upon which the defendant was acquitted, and the fourth. On the second and third counts the controversy was one of fact as to whether the liquor was received by the defendant or Scott.

We do not approve the charge on the fourth count.

If the evidence of the State is believed, the defendant was transporting his own liquor, and not for the purpose of sale, and we do not think handing a bottle to a companion to take a drink is such delivery as is contemplated by the statute, which was construed in *S. v. Little,* 171 N. C., 807, to mean transporting or carrying "to or for any other person, firm or corporation."

This does not, however, entitle the defendant to a new trial, because there are two good counts as to which there is no error, and "It is well settled in this State that where there is more than one count in the indictment, and there is a general verdict, this is a verdict of guilty on each count, and if there is a defect as to one or more counts by reason of any defect therein, or erroneous charge as to said count, or lack of evidence, the verdict will be imputed to the sound count in the indictment, as to which there was no erroneous instruction, and upon which evidence is offered. *S. v. Toole,* 106 N. C., 736, where the authorities to that effect, which are numerous, are collected." *S. v. Holder,* 133 N. C., 711.

No error.

CLARK, C. J., concurs in the decision upon all the grounds on which it is based, but dissents from the *obiter dictum,* because not necessary to the decision of the case, that if the defendant "was transporting his own liquor, and not for the purpose of sale, he could not be held liable in such case."

Laws 1915, ch. 97, sec. 1—"To restrict the receipt and use of intoxicating liquors"—makes it indictable for any one to "ship, transport, carry, *or* deliver, or in any manner, or by any means whatsoever, for hire or otherwise, in any one package, *or* at any one time, from a point within or without this State to any person, firm, or corporation in this State any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons. And it shall be unlawful for any spirituous or vinous liquors or intoxicating bitters so shipped, transported, carried, *or* delivered, in any one package, to be contained in more than one receptacle."

It will be seen that this statute was intended to be comprehensive, and it prohibits any one of several acts, *i. e.,* (1) shipping spirituous or vinous liquors, or intoxicating bitters, or any malt liquors, beyond the quantity named; (2) transporting; (3) carrying; *or* (4) delivering same to any person, etc., in any manner, or by any means whatsoever, for hire or *otherwise,* in any one package or at any time, or contained in more than one receptacle.

Section 2 of that chapter makes it unlawful for any person, etc., "to *receive* at a point without North Carolina for *his or her use,* or for the use of any person, etc., or for any other purpose, any spirituous or vinous liquors," etc., in greater quantity than above stated, at any one time.

The issue of prohibition has been long debated, but this State and the United States have decided in a constitutional manner that the public welfare requires that the shipping, or transportation, or manufacture, or sale, or the mere receipt for one's own use, or any other purpose, etc., or delivery of intoxicating or vinous liquors or intoxicating bitters over a quart, or malt liquors more than five gallons, shall be a criminal offense.

Long debated, the matter has been finally settled, and the law should be construed in the same spirit that it has been enacted so as to effectuate the purpose of the statute. The violation of this statute is by the same means and for the same motive as in cases of larceny; that is, it is done secretly, and for the purpose of making profit out of the deliberate violation of law. This statute simply applies to intoxicating liquor the principle that makes it indictable to "receive, ship, carry, transport, or deliver stolen goods, knowing them to be stolen."

Prohibition being an innovation, so to speak, was unpopular with the minority, and every ingenuity has been used to escape detection and punishment, both in the manner of doing the art, and in seeking to evade punishment by the courts for infringement of the law.

It is for this reason that so many successive statutes have been passed to cure the defects which the ingenuity of counsel have discovered in successive acts, and it is, therefore, that we not only have the Webb-Kenyon Law, the "Search and Seizure Act," and many other acts, but that the statute of 1915, above quoted, makes punishable every manner of handling the forbidden article. It is clearly intended by this statute that whether the receipt or the shipping, or carrying, or transporting should be for the person's own use or otherwise; or for sale, or for the person's own use, such receiving, or shipping, or carrying, or transportation, or delivery is illegal. It does not matter that the delivery of these articles to any person is also forbidden. Each of these other four acts is distinctly made unlawful. The words "other person" are not in the statute, and is only inferred when there is a "delivery," for a person cannot deliver to himself. Nor is it necessary that the delivery shall be for or by sale, for that was prohibited in previous statutes. The act denounces equally the receiving, shipping, transportation, or carrying, whether it is done by the person for himself or for another, and whether the article is to be sold or is to be used by the carrier. It is true that it was intimated contrary to this in *S. v. Little,* 171 N. C., 807, but it was not necessary to that decision. Besides, section 2 did not enter into the consideration of that case, for the "receipt" was at a point in South Carolina.

It is not a question of the intention in shipping or transporting or carrying or delivery, or receiving. Nor does the purpose for which this was done create the illegality, but it is the bare fact of shipping, transporting, or carrying, or receiving in this State, *or* delivering intoxicating, vinous, or malt liquors above the quantities stated in the act, which is made indictable. The intention of the act may be tersely expressed in the phrase, "Taste not, touch not, handle not" the forbidden article. It it outlawed by the statute, just as dynamite or any poisonous drug, and for the same reason that the popular will has deemed this necessary for the public welfare, and made the violation of that will a crime.

The purport of our statutes is identical with the XVIII Amendment of the U. S. Constitution, which prohibits "the manufacture, sale, or transportation of intoxicating liquors" within the United States. It is no exemption either under the State or Federal law that the manufacture or transportation is for one's own use.

STATE v. LOVELACE.

(Filed 10 December, 1919.)

1. **Homicide—Murder—First Degree—Instructions—Evidence—Premeditation.**

   Evidence in extenuation offered by the prisoner upon trial for a homicide, cannot be considered on appeal from the refusal of the court to charge the jury that the evidence would not warrant a conviction of murder in the first degree, but only the single question as to whether there is evidence of premeditation and deliberation, if the evidence is otherwise sufficient.

2. **Homicide—Murder—First Degree—Evidence—Husband and Wife—Parental Influence.**

   Where there is evidence tending to show that the deceased missed his wife from his home after returning from his work, and traced her to her parents' home; that he had previously complained of her parents' interference between his wife and himself, and threatened to kill them if they continued therein; that after he had failed to induce his wife to talk privately with him in his effort to get her to return to his home, he went away, and as the parents and their daughter were sitting upon the porch, he came back again, and taking hold of her, he shot her father twice, without offer of violence on his part, inflicting the mortal wound, and threatened death to the others if they did not comply with his wish: *Held*, sufficient upon the question of deliberation and premeditation of the plaintiff to be determined by the jury upon the issue as to murder in the first degree.

3. **Evidence—Interested Witnesses—Credibility—Instructions.**

Where witnesses interested in the result of the trial have testified, a charge of the judge respecting their testimony, to give it the same weight as other testimony, though they were interested, if the jury were satisfied they had told the truth, is correct.

4. **Homicide—Murder—Defense—Instructions—Appeal and Error—Harmless Error.**

Where the defendant contends upon his trial for homicide that the fatal shot was fired accidentally, a charge that the defendant did not contend that he acted in self-defense is consistent with his position, and it is *Held,* that the defense would be considered to be what the evidence made it, and not what the defendant called it, and if the defendant received the benefit thereof it would not be prejudicial to him.

5. **Appeal and Error—Instructions—Evidence—Error Cured—Homicide.**

Upon the trial for a homicide, evidence of bad feeling between the prisoner and his wife's family if erroneously admitted, the error cured by the judge afterwards telling the jury that they must not consider it in rendering their verdict.

6. **Courts— Evidence— Withdrawn— Appeal and Error— Error Cured— Instructions.**

Upon the trial of the prisoner for the murder of his father-in-law, with testimony that the wife's parents had prejudiced her against her husband, testimony as to the cordial relationship between the prisoner and his wife is incompetent, the question being as to the feeling of the prisoner towards the deceased, and the admission of this evidence in defendant's behalf would tend to prejudice the jury against the deceased, and was properly excluded.

APPEAL by defendant from *Finley, J.,* at the April Term, 1919, of RUTHERFORD.

The defendant was convicted of murder in the first degree, and from the sentence of death upon such conviction appealed.

The deceased, H. E. Edwards, lived on his farm, five or six miles from Rutherford, and about two and one-half miles from Gilkey, a station. The defendant, Dennis Lovelace, who was a flagman, having a regular run on the railroad, had married a daughter of Edwards some nine years before, and had by her four children. The couple lived at Shelby. The wife, Iva Lovelace, with the children, had gone to Union Mills to visit defendant's father, G. W. Lovelace. On Saturday, 31 August, while on his run between Blacksburg and Marion, and when his train had stopped at Union Mills, the defendant was handed a note from his wife, by his father. In this note she informed him that she was at Union Mills, and asked him to come for her and the children the next day, Sunday, and they would go back home together. The defendant could not go on

Sunday, and the wife, instead of going home to Shelby, took the children and went to Gilkey, and out to her father's (the deceased's) home that afternoon. The defendant went to Shelby Sunday afternoon, and not finding his wife and children at home on Monday morning, 2 September, went to Union Mills. Not finding them there, he came back that afternoon to Rutherfordton, where he left the train, hired an auto and went out to the Edward's home, about five miles off. This was about 5:50 p. m.

Lorena Edwards, wife of the deceased, gives this account of the events of that afternoon:

"Iva came to our house on Sunday evening, and this homicide occurred on Monday evening. My husband had been sick all summer and was a small man, something like five feet high and weighed one hundred and fifteen pounds, and wore No. 4 shoe. It was about six o'clock when Dennis came, and Mr. Edwards was in the field where he was having some work done; the boys were there in the field pulling fodder, and he with them; and Dennis came and I went out on the porch and met him, and he told me he wanted to see Iva; I told him I did not want her to see him; he kept begging to talk to her, and I called her and told her he wanted to speak to her. I don't remember whether it was before Mr. Edwards came up to the house or not; don't remember whether Iva was at the door before he came or not, but she came to the door and talked to him, and he kept begging her to have a private chat with her, and she told him she didn't want to; she told him she didn't love him, and wasn't going to live with him. She just told him that she didn't love him, and wasn't going to live with him; said 'We can't agree; and I am just not going with you.' I don't know that he asked her to go then, but he did keep asking her; didn't ask any pointed question; just pleaded for her to have a private chat with him, and she told him she wouldn't talk with him privately; she wasn't going to live with him, because he had mistreated her and she didn't want to live with him. Mr. Edwards came up and he commenced talking to him, and Mr. Edwards told him that I had been sick in bed and he wasn't mad, and said, 'I don't want to have any fuss here at all; just want you to leave and go off and not bother us'; and he said he wasn't going to have any fuss; didn't want to fuss with him; said 'If Iva can't live with me, that's all right; I'll leave, go off somewhere and stay'; and Mr. Edwards mentioned to him that he had been living in Shelby, and that they had some hogs and chickens, and all their things, and nobody to take care of them, and said, 'What are you going to do about it?' and he said, 'Bring it up here'; he said, 'You go and get it; do what you please with it; I don't want it.' Mr. Edwards went with him to the car and they were friendly, and he got in the car, and Mr. Edwards stood there by the car when the car went off, and seemed to be as friendly and on as good terms as ever. After the car left, Mr. Edwards and myself walked around; had some turnip seed sowed that month, and we looked at the turnip patch; and when we come back Iva was sitting in a rocker on the front porch, and Florence and Ruth were sitting on the porch seat on the end of the porch, and Mr. Edwards went over and sat down by Iva on the edge of the porch and leaned back against the column of the porch, the middle column of the porch on the south side of the steps. Coming from the church our home faces in the direction of the church, and a person coming down the road from the church would come in at the front door. I was sitting on the north side of the porch, and we were sitting there and talking, and all at once, at the south end of the house—I was looking toward Iva—I saw Dennis come right around the end of the house; he came up the back way at the kitchen, right around the back end of the house, and Mr. Edwards saw him; I guess we all saw him about the same time. Mr. Edwards said, 'You've decided to come back, have you?' and he said yes, he wanted to come and tell his babies goodbye, and he walked up and seemed like he stooped over like he was going to kiss the babies; and Iva sat on this side and Mr. Edwards was sitting over here (indicating), and when he stooped to kiss the babies he put his hand on Iva's right arm on the arm of the chair, his left hand on her right arm, he standing in front of her. Mr. Edwards was sitting on Iva's right, leaning against the column of the porch, with his feet on the porch, and his hands on his knees, about a foot or two from her, and the baby was on this side. Dennis pulled her, I know, because she held to the arm of the chair and he pulled her so that he pulled her out in the yard, and the chair turned over, and when he did that Mr. Edwards put his hand on his arm and said, 'Dennis, you mustn't do that,' and he said, 'G— damn you, what have you got to do with it?' and shot him. I don't know whether he got the pistol in his coat pocket or his pants pocket, but he got it out with his right hand; his left hand had hold of Iva. My husband was standing straight up and he shot him in the mouth. He was not doing anything, because he didn't have time to do anything; he started off, and I think he was just dying as he started away from him, and as he started away he shot him in the back. Mr. Edwards' arms were up (indicating), and his head was to one side, and he started around the house to the back porch, the way Dennis came; Dennis was close to him when he shot first, and I don't know that he was any further away when he shot the second time than when first shot was fired; he turned around and he shot him in the right shoulder the second time; I saw he was going to fall when Dennis shot him; I started to jump off the porch to go to him, and Dennis said, 'Don't you come here! I'll blow your brains out if you step off the porch!' Said 'Damn you; I'll blow your brains out!' He was still holding my daughter at the time; she pulled like she was trying to get loose, and he cursed her; said 'Damn you; if you don't want a dose of the same medicine you had better be quiet!' Mr. Edwards went around the house; when he shot him he was turning around, and when he threatened to kill me I went through the house, and Mr. Edwards fell just as I got to the back, close to the back steps; he had gotten around; it seemed he tried to put his foot on the bottom to come in, and fell right above the steps on the ground. He was never able to speak; I don't know that he breathed at all; his pulse was beating, and when I raised him up and asked him to speak to me, he looked up at me and just made a fuss in his throat; his tongue was torn up, he couldn't speak, but looked at me as much as to say, 'I'm dying.'"

There was other evidence corroborating this witness.

The defendant offered evidence tending to prove that he went back to the home of his father-in-law to induce his wife and children to return to their home, and if not, to tell them goodbye; that he had no purpose to kill the deceased, and that he was assaulted by the deceased, and took out his pistol to deter him, and that it was fired accidentally and inflicted the mortal wound in this way.

The defendant introduced two witnesses by whom he proposed to show that the relation between him and his wife was cordial. This evidence was excluded, and the prisoner excepted.

The State was permitted to show that it was the general reputation, by one J. D. Morris, that the defendant was disagreeable with his own family, including his wife. This evidence was excepted to by the prisoner.

At the close of the testimony of the witness, J. D. Morris, the court took recess, and upon reconvening, the court called the stenographer and had her read, in the presence of the jury, the testimony of J. D. Morris on cross-examination, to the effect that there had been rumors that the defendant was disagreeable with his family, his father and mother, and his wife as well; and further, that the witness had heard that he had run his father and mother from home. The stenographer read all the evidence to which exceptions Nos. 3 to 6, inclusive, on cross-examination of witness Morris relate.

The court then stated to the jury: "This evidence on cross-examination of J. D. Morris that was objected to by defendant and admitted by the court is withdrawn from your consideration. After looking into the matter I am satisfied that it is incompetent, and it should not have been presented to you, and you will not consider it in making up your verdict. You have heard the evidence just read as to the general reputation of the defendant for doing certain acts, for mistreating his wife, and running his father and mother away from home. You need not consider that in making up your verdict."

To the action of the court in having the stenographer read the said testimony to the jury the defendant excepts (but this exception was not taken at the trial).

At the conclusion of the evidence the prisoner requested the court, in writing, to instruct the jury that the evidence did not warrant a conviction of the prisoner of murder in the first degree, which was refused, and the defendant excepted.

His Honor instructed the jury, among other things, as follows:

"You are the sole judges of the testimony, and you are also the sole judges as to how much force you shall give any witness's testimony that comes before you. You can take into consideration the demeanor of the witness on the stand. You can take into consideration such impression as they make on you as to whether they told you the truth or have not told the truth. You can also consider as to whether or not their interest in the result of your verdict has swayed them in telling the truth. In this case it is well enough to charge you that the law looks with some suspicion upon the testimony of interested witnesses, but, notwithstanding that fact, if you are satisfied that the defendant or any other witness has told the truth about all or any part of this testimony, why you can give their testimony as much weight as any other witness, in the event you are satisfied they have told the truth."

The prisoner excepted to the last two sentences in this charge.

His Honor also said, in stating the contentions of the prisoner: "It is not contended by the prisoner that he killed the deceased in self-defense," to which the defendant excepted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Pless & Winborne, W. C. McRorie, O. Max Gardner, and W. A. Self for defendant.

ALLEN, J. The exception chiefly relied on by the prisoner is to the refusal to instruct the jury that the evidence would not warrant a conviction of murder in the first degree, and in dealing with this exception we cannot consider evidence in extenuation or explanation offered by the prisoner, but are confined to the single question as to whether there is evidence of premeditation and deliberation.

In *S. v. McCormac,* 116 N. C., 1036, the Court says: "While premeditation and deliberation are not to be inferred as a matter of course from the want either of legal provocation or of proof of the use of provoking language, yet all such circumstances may be considered by the jury in determining whether the testimony is inconsistent with any other hypothesis than that the prisoner acted upon a deliberately formed purpose. *S. v. Fuller,* 114 N. C., 885. Kerr (in his work on Homicide, sec. 72) says: 'The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense.' The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment. The conduct of the accused just before or immediately after the killing would tend at least to show the state of mind at the moment of inflicting the fatal wound. In passing upon the question whether the facts in a given case are sufficient to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, while sudden passion aroused by provocation that would neither excuse nor mitigate to manslaughter the killing with a deadly weapon, is sufficient, if the homicide is committed under its immediate influences, yet the want of provocation, the preparation of a weapon, proof that there was no quarreling just before the killing, may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design." *S. v. Daniels,* 164 N. C., 469.

Applying this principle, we not only find the circumstances pointed out in the *McCormac case* as evidence of premeditation and deliberation, but also other corroborative circumstances.

According to the evidence for the State, the prisoner has prepared a weapon, there was no quarreling, and the killing was without provocation.

In addition, the prisoner admitted while testifying in his own behalf that he had not had much trouble with his wife, "except what the old folks caused"; one Wood testified that he saw the prisoner a week or two before the homicide, and he seemed to be in trouble, and upon inquiry he said if his father-in-law didn't quit bothering with his family affairs he was going to have to go up and kill him."

Flynn, who carried the prisoner to the home of his father-in-law on the evening of the homicide, testified, "When we started back I said, 'Did you marry one of Mr. Edwards' daughters?' and he said yes, and called her name, and I said, 'What's your trouble?' and he said his wife went to see his father, I believe, on a visit, and went down to Mr. Edwards, and got down there and then wouldn't go back home, and he said, 'Them damned old sons of bitches was the cause of it all.'" After he had inflicted the mortal wound he said, "I've been wanting to get you a long time," and his threats and conduct immediately following the shooting.

Much of this evidence for the State is contradicted, and other parts explained or discredited, but these were matters for the jury, and under all the authorities the evidence was sufficient to justify submitting to the jury the charge of murder in the first degree.

The charge requiring the jury to consider the interest of the defendant and other witnesses, but if satisfied they had told the truth they could give their evidence as much weight as the evidence of other witnesses is in accordance with our precedents and not prejudicial to the prisoner. *S. v. Lance,* 166 N. C., 411.

His Honor was stating the position of the prisoner accurately when he said that the defendant did not contend that he killed the deceased in self-defense, because the whole of his evidence tended to prove that he did not intend to kill the deceased at all, and that the pistol fired accidentally, but, however this may be, it makes no difference what the defense of the defendant was called if he had the full benefit of it before the jury, and this was accorded to him.

The full charge on this phase of the case is as follows:

"It is not contended by the prisoner that he killed the deceased in self-defense, but it is contended that the deceased had a brick, and that the prisoner was not in the wrong when the deceased had the brick in his hand, and that he drew his pistol to avoid an apparent assault from the deceased with the brick, and that thereafter the deceased and the wife of the prisoner and the prisoner got into a struggle over the pistol, and that the pistol accidentally fired, and that the killing was therefore unintentional and accidental, and the court charges you that though you should find from the evidence beyond a reasonable doubt that the deceased came to his death as the result of a shot from a pistol in the hands of the defendant, yet if you find from the evidence that the defendant, at the time he took the pistol from his pocket, believed, and had reasonable grounds to believe, that the deceased had a deadly weapon in his hand, and apprehended and had reasonable grounds to apprehend that unless he used the pistol or made a demonstration of a purpose to use it he would suffer death or great bodily harm at the hands of the deceased, and, thereafter, in a struggle which ensued, the pistol was discharged without any intention on the part of the defendant to discharge the weapon, then the court charges you that if the defendant has satisfied you that the killing took place in this way, that it is not a felonious homicide, and you will return a verdict of not guilty."

This states the contention of the prisoner as he testified.

It is unnecessary to consider the competency of the evidence of the witness Morris as to the disagreeable relation existing between the prisoner and his wife, because if there was error on its reception it was cured by its withdrawal and by the explicit instruction not to consider it.

"If juries should be deemed incompetent to comprehend, or unable to obey, so plain a direction as that a paper read in their hearing is 'not to be considered as evidence, and that it had only been admitted to make the defendant's reply to it (when read to him) intelligible'—if so low an estimate should be placed upon juries, then the jury system is a failure, and should have no place in our jurisprudence." *S. v. Crane,* 110 N. C., 535.

The evidence offered to prove a cordial relation between the defendant and his wife was properly excluded.

It could not be received on the question of the defendant's character, because not confined to general character (*S. v. Ussery,* 118 N. C., 1181). and as a circumstance it was not relevant to any issue before the jury. The material inquiry was as to the feeling of the prisoner towards the deceased, which the rejected evidence would have had the tendency to intensify in the estimation of the jury, as resentment would naturally be greater against one who had caused the separation from an affectionate wife.

We have examined the record with care and find no error, but we cannot but be impressed by the evidence, which shows very clearly that this tragedy, which has wrecked two homes, could have been easily averted if the deceased and his wife had given a little encouragement to their daughter to return to her home and her duties.

No error.

STATE v. MARK LOWE.

(Filed 10 December, 1919.)

1. **Lotteries—Definition.**

   A lottery is defined to be any scheme for the distribution of prizes, by lot or chance, by which one paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine.

2. **Lotteries—Games of Chance—Selling Devises.**

   By the use of a machine called a "merchandise vendor," cards were arranged in several parallel columns, each one calling for the sale of a collar button at five cents each. Every twentieth card called also for a fifty-cent box of candy. By operating a crank each purchaser received a card good for the collar button, and at every twentieth card he was entitled to a fifty-cent box of candy besides. The machine was so arranged that the operator could not tell whether he would receive only the collar button for which he had paid, or in addition, the candy. *Held,* the device was a gambling one within the intent and meaning of our statute, the chance being as to who would draw the twentieth card and receive the candy in addition to a collar button, which all received.

3. Same—Small Values.

The fact that a gambling device is for small values does not relieve it of its objectionable features, for upon the same principle one involving large amounts may be operated. It is the element of chance that makes it pernicious to public morals, which it is the object of our statute to prevent, and for this reason it is condemned.

INDICTMENT for carrying on and promoting a lottery, by means of a slot machine, tried before *Finley, J.*, and a jury, at July Term, 1919, of BUNCOMBE.

The jury returned a special verdict as follows:

"The defendant is a merchant in the city of Asheville, and used in connection with his business a machine called a 'merchandise vender,' which is so constructed as to hold a large number of cards in parallel columns and with a glass front. There are six of these columns of cards, and each card calls for a particular article of merchandise, and gives the price of such articles of merchandise. A prospective purchaser could purchase any of the articles of merchandise shown on such cards for the price stated thereon by pulling a slot which would remove such card from the machine. Six cards were displayed to a prospective purchaser, giving the articles and prices aforesaid, and the purchaser could draw out either of said six cards and obtain the articles of merchandise mentioned thereon by paying the price indicated on said card. As each card is drawn out, another card takes its place. In each instance the purchaser sees the card before it is withdrawn from the machine, and knows the articles of merchandise called for and the price to be paid by him therefor, but until the card is withdrawn does not see the name of the article on the succeeding card. The machine operated by the defendant was arranged to vend collar buttons at 5 cents each, and all of the cords in said machine had the words 'collar buttons,' and the figure and word '5 cents' printed thereon, with the exception of certain cards, which had printed thereon the words 'One box of candy,' and the figure and word '5 cents.' The cards were so placed in said machine that every twentieth card to be drawn therefrom called for a box of candy, while all the other cards called for a collar button, and the defendant advertised that every twentieth card in the case would entitle the purchaser thereof to a box of candy. As the cards are drawn from the machine, they are presented to the defendant, who gives the purchaser the article called for on such cards, and collects from such purchaser the amounts stipulated on such cards. Each box of candy was worth 50 cents, but the price charged through the machine is 5 cents. The witness for the State went into the place of business of the defendant and to said machine, where he saw a card reading, 'One collar button, 5 cents,' and next to the machine he saw displayed in the showcase a large number of collar buttons, each of which were regularly retailed for 5 cents, which he was informed were the collar buttons called for on the cards in said machine. The State's witness then drew one card from said machine with the words and figures 'One collar button, 5 cents,' thereon, which he presented to the defendant and thereupon received from the defendant one collar button, and paid the defendant 5 cents. If upon the foregoing statement of facts the court be of the opinion that the defendant is guilty, the jury so finds; but if upon the foregoing statement of facts the court be of the opinion that the defendant is not guilty, the jury so finds."

The court rendered the following judgment upon the verdict:

"Upon the coming in of the foregoing special verdict, the court is of the opinion that the defendant is not guilty of the charge contained in the bill of indictment, but that he is operating a gift enterprise, taxable under the Revenue Act as such, and that a license authorizing the defendant to carry on such gift enterprise is a protection against a criminal prosecution. It is, therefore, adjudged that the defendant is not guilty, and that he be discharged."

The State excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Mark W. Brown for defendant.

WALKER, J., after stating the case: It seems to us that the special verdict places this case alongside of those we have held like schemes for making money by the lure of a chance to get something in exchange either for nothing or for something of much less value. It is a direct, though in this case not a very artful appeal, to the gambling instinct. The object of this gift enterprise, or whatever you may call it, to evade the law against conducting lotteries, while sufficiently visible, is attempted to be concealed under the artful contrivance of a transaction having the false garb of simplicity and fair dealing, but the law denounces it all the same.

A lottery, for all practical purposes, may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. This definition has generally been approved by the authorities. *S. v. Lipkin*, 169 N. C., 265, 271; *S. v. Perry,* 154 N. C., 616, and cases cited; *Long v. State,* 74 Md., 565. We could not better show the real character of this new device than to reproduce, to some extent, what we have heretofore substantially said about such attempts to circumvent the law against lotteries in *S. v. Perry, supra,* and *S. v. Lipkin, supra:* "The sale of the ticket gave the purchaser the chance to obtain something more than he paid for, and the other fact became an extra inducement for the purchase, making the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game, and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing, and in order to protect the unwary against the insidious wiles of the fakir or the deceitful practices of the nimble trickster. Call the business what you may, a 'gift sale,' 'advertising scheme,' or what not, it is none the less a lottery, and we cannot permit the promoter to evade the penalties of the law by so transparent a device as a mere change in style from those which have been judicially condemned, if the gambling element is there, however deep it may be covered with fair words or deceitful promises. If it differs from ordinary lotteries, it is chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thoroughly dishonest and injurious to society. So far as those who manage schemes of this character can be supposed to give the credulous persons who deal with them any chance whatever of a return in greater value for their investment, the chance lies in the purchase of the right to participate in the favor offered or held out to tempt the gambling instinct, and thereby to prosper the business of the unlawful concern. All pay them money, at least in part, for the chance of winning a prize of greater or less value in proportion to what they hazard, however it may be glossed with some apparent safeguard against loss. Many will take the chance of the play, not expecting to continue the payments if they should lose at the first, second, or third attempt, or at some later period. According to every correct idea of legal definition or conception, this must be gaming within the meaning of the law, whether we construe it in letter or in spirit. All new artifices designed to evade and cheat the law, and entrap the unwary or ignorant, are but aggravations of the offense, and the more ingenious and deep-laid they are, the greater the wrong," citing *Dunn v. The People*, 40 Ill., 465; *Bell v. State*, 37 Tenn. (5 Speed), 507; *Deflorin v. State*, 121 Ga., 593; *State v. Moran*, 48 Minn., 555; *Myer v. State*, 112 Ga., 20; *State v. Clarke*, 33 N. H., 329.

The *Austrian Bond cases* illustrate the idea of the law as to what is a lottery. It was said of the chance feature, involved in their sale and purchase, by the Court in *Ballock v. State*, 73 Md., 1 (8 L. R. A., 671), and approved by the highest Federal Court in *Horner v. United States*, 147 U. S., 449 (37 L. Ed., 237), that at some uncertain period determined by the revolution of a wheel of fortune, the purchaser of a bond does get his money repaid; but we do not think this deprives the thing of its evil tendency, or robs it of its lottery semblance and features. The inducement for investing in such bonds is offered of getting some "bonus" large or small, in the future, soon or late, according to the chances of the wheel's disclosures. The investment may run one year or it may run thirty years, according to the decision of the wheel. It cannot be said this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit and a love of making gain through the chance of dice, cards, wheels, or other method of settling a contingency. It certainly cannot be said that it is not in "the nature of a lottery," and that it has no tendency to create desire for other and more pernicious modes of gaming. Our statute does not justify a court, expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery, simply because there can be no loss, when there may be very large contingent gains, or because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies, which the State is seeking to prevent. After discussing the *Austrian Bond cases*, the Court held in the *Horner case, supra,* that it is not necessary, however, that the consideration moving to the holder of the ticket or chance be free from any element of certainty. That every purchaser of a ticket or chance is to be repaid in something definite and certain in addition to the chance feature does not make the scheme any the less a lottery. "The element of certainty goes hand in hand with the element of chance, and the former does not destroy the existence or effect of the latter." The same was, in effect, said by us in *S. v. Perry, supra,* and *S. v. Lipkin,* supra.

As to what has been held to be lotteries by the courts of the several States, reference may be made to *Com. v. Chubb*, in the general court of Virginia, 5 Rand. (Va.), 715; *Dunn v. People*, 40 Ill., 465, where it was said that the character of the transaction would not be changed by assuming that the ticket represented an article of merchandise intrinsically worth the amount which the holder thereof would be obliged to pay, and that if every ticket in any ordinary lottery represented a prize of some value, yet if those prizes were of unequal values, the scheme of distribution would still remain a lottery; *Thomas v. People*, 59 Ill., 160, where a ticket was a receipt for money in payment for the delivery of a copy of an engraving, and for admission to certain concerts and lectures, for which it was sold, and money was to be distributed in presents amounting to a certain number, to the purchasers of engravings, and it was held that that was a scheme for the distribution of prizes by chance, and constituted a lottery, it being apparent that some of the purchasers would fail to receive a prize, and that even if the ticket to the concerts and lectures, and the engraving, were intrinsically worth the price paid, the scheme would still be a lottery; *Chavannah v. State,* 49 Ala., 396, where it was held that the venturing of a small sum of money for the chance of obtaining a greater sum was a lottery; *Com. v. Sheriff,* 10 Phila., 203, where it was said that whatever amounted to the distribution of prizes by chance was a lottery, no matter how ingeniously the object of it might be concealed; *Holoman v. State,* 2 Tex. App., 610, where it was held that selling boxes of candy at fifty cents each, each box being represented to contain a prize of money or jewelry, the purchaser selecting his box in ignorance of its contents, was a device in the nature of a lottery; *S. v. Lumsden,* 89 N. C., 572, where a like device was held to be a lottery, and *Com. v. Wright,* 137 Mass., 250. Cases in England are to the same effect. In *Reg. v. Harris,* 10 Cox, C. C., 452, it was held that a lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what purported to be of the value of a shilling, and also to the chance of a greater value than a shilling, was an illegal lottery within the statute. In *Sykes v. Beadon,* L. R., 11 Ch. Div., 170, 190, there were holders of certificates, who subscribed money to be invested in funds which were to be divided amongst them by lot, and divided unequally, that is, those who got the benefit of the drawings received a bond bearing interest and a bonus, which gave them different advantages from the persons whose certificates were not drawn; and it depended upon chance who acquired the greater or the lesser advantage. The scheme was held to be a subscription by a number of persons to a fund for the purpose of dividing that fund among them by chance, and unequally; and Sir George Jessel, Master of the Rolls, characterized the scheme as a lottery. In *Taylor v. Smetten,* L. R., 11 Q. B. Div., 207, packets were sold, each containing a pound of tea, at so much a packet. In each packet was a coupon entitling the purchaser to a prize, and that fact was stated publicly by the seller before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it. It was held that the transaction constituted a lottery within the meaning of the statute.

With these guides before us, let us examine the particular facts of this case and apply what appears to be the settled law, referring first to *S. v. Perry, supra,* where it is said: "By the turn of a crank patrons of this defendant received a good return for a comparatively small outlay, the right to which was determined, not by skill or legitimate effort, but by luck or chance. It is gambling, pure and simple, and has fallen under the ban of an enlightened public opinion, and is condemned by the law." The scheme here is a simple one, and the amount of possible gain very small; but if it may be applied legitimately to "collar buttons and a box of candy," it may as well be applied to houses and lots, or to any other valuable property. We do not understand that the relative amount of gain in any sense fixes the criminality of such devices. As shown in the above extract, the test is the venturing of small sums of money upon the chance of obtaining a larger value. This definition certainly shows that the scheme here was a lottery within the meaning of our statute. There were columns of cards in the machine, it is stated, with a glass front so arranged that only one card could be seen. Upon that card was printed the article to be purchased and the price. The proposed purchaser, by pulling a slot, removes the card from the machine and takes it to the merchant, to whom he pays the price and receives the article. The machine is called a "merchandise vender." So far the transaction appears to be perfectly innocent. As a matter of fact, however, using the evidence in this case as a basis for further discussion, when the purchaser moves the card from the machine another card drops down in its place. The cards were so arranged that nineteen of them had printed on them "Collar button, 5 cents," while every twentieth card, though costing only 5 cents, entitled the holder to a box of candy worth 50 cents. The element of chance here is that the purchaser of a collar button for 5 cents may, under a certain contingency, receive a box of candy worth fifty cents for only five cents. It seems that the judge had some idea that because the recurrence of a box of candy was automatically fixed to be at regular and invariable periods, or intervals, that, therefore, there was no element of chance in it so far as the merchant was concerned. This suggestion, however, is fully met by *S. v. Lipkin*, 169 N. C., 265. In that case there was not only no element of chance in the scheme, so far as the seller was concerned, but he himself exercised an option as to which one of his purchasers should receive the prize. As was said in that case: "No sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited, or if it has the element of chance. It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps, and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing." The defendant in that case claimed that his device was solely for advertising purposes, but the Court held generally that the element of chance necessary to constitute a lottery need not always consist in the selection of the beneficiary by lot, but that it is sufficient if, at the time of the purchase of the right to draw, there is a chance that the purchaser will receive more or less according to some event then undetermined and not subject to be foreseen or controlled by the purchaser. In this case the element of chance is removed but one degree from the act of the purchaser in taking out the card on which is printed "Collar button, 5 cents." When he takes out this card another falls immediately in its place, and he knows whether that is for a collar button or for a box of candy. This, it seems to us, is far from making the scheme innocent, but makes it more vicious. It is the chance that the collar button card may be succeeded in one, two, or three numbers by the box of candy card, which makes the lure stronger and more tempting. It is evident that this was a scheme devised to sell collar buttons, at a good profit, of course, by luring purchasers on with the hope of gain. The merchant does not take any risk of loss; on the contrary, even when he gives a box of candy for 5 cents, the profit he has made on the sale of nineteen collar buttons not only enables him to pay for the machine, but to recoup any loss on the candy.

We suppose that there are still some left who will continue to experiment with this law against the lottery, one of the worst and most demoralizing forms of gambling, because it induces and inveigles others to become victims of its debasing tendencies, and fosters the evil habit of trying to get something for nothing, in order to make riches quickly and by what is mistakenly supposed to be the shortest and easiest method. When once imbued with the spirit of this sort of gambling it leads to other evils of a more wicked character, and more dangerous and hurtful to the general public, who are the innocent sufferers.

This cunningly devised instrument, called by the seductive and misleading name of "merchandise vender," is worked by a slot and crank, instead of a "wheel of fortune." A patron buys a card for five cents — not knowing how many have bought before him—in the hope that by mere chance he may become the fortunate holder of the lucky card. He will get a collar button for the five cents he invests, and may get something more, valued at fifty cents. In other words, for five cents he may, if his luck is good, "win" fifty cents worth of property, in the form of a box of candy. The case, in this aspect, is not at all different in principle from *S. v. Lumsden,* 89 N. C., 572, and is much like it in its facts. It appeared there that the defendant sold to customers small boxes of candy, of trifling value, for the chance or opportunity of designating one of certain pictures, conveniently arranged in his place of business, behind some of which were small sums of money, and behind others a card on which was the letter "C," the purchaser getting either the money or the card, as he may select; but if he got a card, he became entitled to another box of candy. The Court held that the scheme constituted a lottery, and was in clear and open violation of our statute, citing *S. v. Bryant,* 74 N. C., 207. *Judge Settle,* in the last cited case, said that buying lottery tickets was not then indictable, and the defendant could not, therefore, be convicted, but the chief offender could be, and that "the enterprise described in the special verdict is a lottery, and a lottery is a species of gambling, and gambling is immoral, and is denounced by statute."

If there were no element of chance in this new—though not very novel scheme, but a slight variation from others which have been unsuccessfully tried—it would attract no customers and would work no harm to the public, but with the element of chance, which too plainly exists to be concealed even from an unsuspecting jury, or court, it is a clear menace to public morals.

The manager of a device, such as that described in this case, who invites others to take a chance at the play, is guilty under the statute of conducting a lottery, as much so as if the risk was the same as in throwing dice, or in the turn of the cards in poker or faro. It is not the degree of risk, whether great or small, that determines the unlawful element in the scheme, but the mere chance of winning appeals to the cupidity of others, and tempts them to try their luck, and play at the game.

However these attempts to evade the statute may be concealed, the law will uncover them, and, in order to prevent their repetition, will lay its hand heavily upon the perpetrator, as it should do. No more effective way of repressing crime has ever been devised than swift, adequate, and, above all, certain punishment, especially for those who resort to evasion in order to escape the penalty. The frequency of such attempts calls for vigorous treatment.

The judgment of the court is reversed, and set aside, a verdict of guilty will be entered upon the special findings, and such other proceedings had as the law provides.

Reversed.

CLARK, C. J., concurring.

CLARK, C. J., concurring: The amounts involved in this case are very small, but the principle is that of a lottery, and, if admissible, can be used in larger enterprises. It is true that the number who can receive a prize is fixed at one in twenty, but the element of chance is as to who shall be the twentieth man.

In the Texan War for Independence against Mexico some 250 Texans (10 of them from this State) surrendered as prisoners of war at Mier, and were marched off into the interior. At Salado, 25 March, 1843, they were marched by an urn which contained a black bean for every nine white, and those who drew black beans were drawn up in line and instantly shot by a firing squad. Thomas J. Green's "Mier Expedition," 170. In this "Lottery of Death" the number doomed was definite, one in ten, but the chance as to who should be the tenth man was a gamble with death. The principle that selects by chance one in twenty for a prize is exactly the same that selects one man in ten for instant death. There is no uncertainty as to the percentage who shall draw the black bean or the prize. The gamble is in designating, by chance, the persons.

STATE v. JERRY DALTON.

(Filed 20 December, 1919.)

1. **Homicide—Murder—Bystander—Accidental Killing.**

Where one man, engaged in an affray or difficulty with another, unintentionally kills a bystander, his act shall be interpreted in reference to his intent and conduct towards his adversary, and his criminal liability for the homicide or otherwise, and the degree of it, must be thereby determined.

2. **Same—Instructions—Appeal and Error—Reversible Error.**

Where there is evidence, on the trial for a homicide in the accidental killing of a bystander by the prisoner in a fight with another, that the prisoner's intent in such fight was either murder in the first degree, murder in the second degree, or that he acted in self-defense, this intent will govern the degree of the crime committed, or the acquittal, as to the killing of such bystander; and it is prejudicial and reversible error for the court to instruct the jury that they should find the prisoner guilty of murder in the first degree, if they found the intent was for murder in the second degree, and make the verdict to depend upon whether the prisoner's intent was to commit a felony, etc.

3. **Same—Statutes—Degrees of Murder—Common Law.**

Our statute, Rev., 3631, dividing murder into two degrees, one punishable by death and the other in the State's Prison, does not give any new definition of murder, but the same remains as it was at common law before the enactment; *i. e.*, the unlawful killing of a human being with malice aforethought, which malice may or may not arise from a personal ill-will or grudge, it being sufficient if there is an intentional killing without excuse or mitigating circumstances; and where there is an accidental killing of a bystander, it does not come within the classification of murder in the first degree merely because it occurred in the perpetration of, or effort to perpetrate a felony, but the prisoner's intent to kill his adversary must be shown beyond a reasonable doubt to have been willful, deliberate and premeditated, and to be determined upon the principles of the common law.

INDICTMENT for murder of Maude Williams, née Grant, tried before *Ray, J.*, and a jury, at August Term, 1919, of MACON.

The prisoner was convicted of murder in the first degree. Judgment on the verdict, and prisoner appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. D. Sisk and J. N. Moody for defendant.

HOKE, J. It was proved on the trial that on the afternoon of 10 November, 1918, in said county, the prisoner shot and killed the deceased, Maude Grant, and also killed Merrill Angel, who was with her at the time.

The facts in evidence on the part of the State tended to show that the prisoner, who had been drinking heavily for several weeks, and was angered because the deceased, spoken of in some of the testimony as "his girl," was with Merrill Angel; saw the two pass in the latter's automobile, and, as they returned shortly after, the prisoner signalled to the car, and when it came to a stop he approached it from the left side where Merrill Angel was at the wheel, Maude being on the same seat, and began a conversation with them, beginning in a low tone and growing louder as it proceeded; that Maude got out of the car on the opposite side from the prisoner, and as she walked towards the front the prisoner fired a pistol shot at her, and, as she was falling, immediately fired another, one of the shots inflicting a mortal wound, from which she presently died. The prisoner then fired a third shot through the windshield of the car, killing Merrill Angel. One of the bystanders, Will Stepp, testifying to the occurrence, in part said: "After a while I saw Jerry shaking Maude, and could hear her beg, 'Don't, Jerry! dont!' and when she was saying 'don't' Jerry was shaking her. He was on the side of the car that Angel was in, and reaching across Angel. Jim Barnett rode up to the back of the car and took hold of Jerry, and Jerry shoved him back, and in a second I saw Angel catch Jerry's hand. It seemed like he had something in his hand, and Jerry took a step backward, and by that time Maude jumped from the car and Jerry shot; Jerry jerked loose and Maude jumped from the car and Jerry shot; cannot tell what direction he fired. Dalton then took a step to the left to the forewheel of the car and fired again, and she fell. He then turned and fired through the windshield at Angel, and that was all I saw. I left and did not see anything more. Did not see Angel do anything except try to catch whatever Dalton had in his hand. Just as quick as Dalton jerked back from Angel he fired the first time." The prisoner, a witness in his own behalf, testified in part as follows: "That he approached the car and entered into a conversation with the parties, and thought everything was friendly; that, in the course of the talk, Maude asked witness where he was going, and he replied he was going to Choga to get Hollifield's horse for the purpose of going over to the flats, and witness then asked: 'Won't you go with me?' and she said yes, because Merrill is going over to Franklin this evening. Whereupon Merrill said: 'No; you can't go. Before you shall go I will kill you both, God damn you!' and threw his hand to his pocket. That witness said 'Let's not do that,' and jumped back to draw his pistol, and it hung somehow at first and went off in witness's hand as he drew it to shoot Angel, etc. That his pistol fired three times." Further, witness testified: "That I killed Maude Grant accidentally; as I jerked my pistol out of my pocket, it fired and killed her." There was much other testimony on the issue, but the above is sufficient for a proper apprehension of the question chiefly involved in the prisoner's appeal, presented in an exception as follows: In one aspect of the evidence, the court instructed the jury:

"If you find beyond a reasonable doubt that he (the prisoner) came to the car, and that he was not assaulted by Angel, or an attempt made to take his life or do him great bodily harm, at the hands of Angel, but if he purposed in his mind to shoot Angel or do him great bodily harm, and that he did not have premeditation and deliberation when he undertook it, but did it under circumstances that if he had shot him and killed him, it would be murder in the second degree or manslaughter, and in carrying out that intention he had accidentally killed Maude, he would be guilty of murder in the first degree, because he would be doing a felonious act, or attempting a felonious act, when he accidentally killed the girl."

To this portion of the charge exception was duly taken, and, on the record, we are of opinion that this objection of the prisoner must be sustained.

In cases of this character, it is the generally accepted principle that, where one man, engaged in an affray or difficulty with another, unintentionally kills a bystander, his act shall be interpreted in reference to his intent and conduct towards his adversary, and criminal liability for the homicide, or otherwise, and the degree of it must be thereby determined. A very correct statement of the general principle is given in 13 R. C. L., title Homicide, sec. 50, pp. 745-46, as follows:

"The fact that the homicidal act was intended to compass the death of another person does not in any measure relieve the slayer of criminal responsibility. He is guilty or innocent exactly as though the fatal act had caused the death of the person intended to be killed. The intent is transferred to the person whose death has been caused. The result is that the slayer has been held guilty of murder or manslaughter or excusable homicide, according to the attendant circumstances. If the killing of the person intended to be hit would, under all the circumstances, have been excusable or justifiable on the theory of self-defense, then the unintended killing of a bystander by a random shot fired in the proper and prudent exercise of such self-defense, is also excusable or justifiable. And if the killing of the intended victim would have been reduced by the circumstances to murder in the second or third degree, or to manslaughter in any of the degrees, then the unintended and accidental killing of the bystander resulting from any act designed to take effect upon the intended victim would be likewise reduced to the same grade of offense as would have followed the death of the victim intended to be killed." And well considered decisions here and elsewhere and approved text-books are in full support of this statement of the doctrine. *S. v. Cole,* 132 N. C., 1069-1076; *S. v. Fulkerson et al.*, 61 N. C., 233; *Pender v. State*, 27 Fla., 370; *Commonwealth v. Breyessee,* 160 Pa. St., 451; 1 Wharton Criminal Law (11 ed.), sec. 500.

Applying the principle, the prisoner in this case is indicted for the willful murder of Maude Grant, one correct definition of the crime being the unlawful and intentional killing of another without excuse or mitigating circumstance. A witness in his own behalf, he testified, in effect, that he did not intentionally kill the deceased, but that he killed her accidentally in the effort to draw his pistol to defend himself from an assault by Merrill Angel. If the testimony should be accepted by the jury, his guilt or innocence must be determined by reference to his intent and conduct towards Merrill Angel and not otherwise. If, under the circumstances presented, the killing of Merrill Angel would have constituted murder in the second degree or manslaughter as to him, this would afford the correct measure of the prisoner's liability for the homicide for which he stands indicted, and it constitutes reversible error for the court to charge the jury, as it did in effect, that "if" the prisoner, without premeditation and deliberation, was engaged in an attempt to shoot Angel and under circumstances that if he had shot and killed him, it would be murder in the second degree or manslaughter, and, in carrying out his intention, he had accidentally killed Maude, he would be guilty of murder in the first degree, because he would be doing a felonious act when he accidentally killed the girl. His Honor may have given the charge excepted to under the impression that the same was justified and required by a proper consideration of an act dividing the crime of murder into two degrees, but, to our minds, the position does not correctly interpret the law. This statute, Rev., 3631, provides that "A murder, which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetration, or attempt to perpetrate, any arson, rape, robbery, burglary, or other felony, shall be murder in the first degree, and punished with death. All other kinds of murder shall be murder in the second degree, and punished by imprisonment in the State's Prison, not less than 2, nor more than 30 years." In *S. v. Banks,* 143 N. C., 652-656, it was earnestly contended in behalf of the defendant, convicted of murder in the first degree under the statute, that such a conviction could only be sustained where the "unlawful killing was done from personal ill-will or grudge between the parties," and the Court, in disapproving the position, said:

"There has been no change wrought in this respect by the statute dividing the crime of murder into two degrees, Rev., 3631, as to the element of malice which must exist to make out the crime.

"Both before and since the statute, murder is the unlawful killing of another with malice aforethought. See Clark's Criminal Law, p. 187. This malice may arise from personal ill-will or grudge, but it may also be said to exist whenever there has been a wrongful and intentional killing of another without lawful excuse or mitigating circumstances. The statute does not undertake to give any new definition of murder, but classes the different kinds of murder as they existed at common law, and which were, before the statute, all included in one and the same degree.

"Thus, all murder done by means of poison, lying in wait, etc., or by any other kind of willful, deliberate, or premeditated killing, or murder done in the effort to perpetrate a felony, shall be murder in the first degree, and punished with death. All other kinds of murder shall be deemed murder in the second degree, and punished by imprisonment in the State's prison. But the constituent definition of murder remains as it was, and in neither degree is it necessarily required that the unlawful killing shall be from personal ill-will or grudge."

From this authoritative construction, it appears that the statute does not, and does not intend, to give any new definition of murder, but only classifies the crime, dividing the same into the two degrees; making all murder done by lying in wait, etc., or any other kind of willful, deliberate, or premeditated killing, and all murder done in the perpetration or effort to perpetrate any of the graver felonies, murder in the first degree. And from this it follows that an accidental killing does not come within the classification of murder in the first degree merely because it occurred in the perpetration of or effort to perpetrate felony, but only when the killing amounted to murder done in such effort, and on the facts of this record, and assuming this killing of Maude Grant to have been accidental as the prisoner testified, the only way it could be made to constitute murder in the first degree is for the State to establish beyond a reasonable doubt that such killing occurred while the perpetrator was presently engaged in the willful, deliberate, and premeditated effort and the intent to kill and murder Merrill Angel, this to be determined under the principles of the common law as approved and illustrated in the decisions heretofore cited, and others of like import. There is high authority for the position that the accidental or unintentional killing of a bystander may never amount to a graver crime than murder in the second degree. *Thomas v. State,* 53 Texas Criminal Appeals, p. 272, and other cases, but we are of opinion that the contrary is the sounder view, and more in accord with our own decisions on the subject, to the effect that such a killing may be held murder in the first degree when it occurs, as stated, while the perpetrator is presently engaged in the willful, deliberate, and premeditated effort to kill and murder another. See *S. v. Cole,* 132 N. C., at p. 1076; 1 Wharton Criminal Law (11 ed.), sec. 508; 13 R. C. L., 774-75-76-77.

There are cases apparently in support of his Honor's charge, and which hold that any killing done in the perpetration of or effort to perpetrate the specified felonies will constitute murder in the first degree, but so far as examined, these rulings were made on statutes differing from ours, and which permit and perhaps require a different interpretation.

In discussing this question, we have referred throughout to the defendant's testimony only because it is in his evidence that the exception is presented, and we deem it not improper to say that, on perusal of the record, there is evidence on the part of the State which requires that the question of murder in the first degree be submitted as an independent proposition, and irrespective of the prisoner's conduct in reference to the killing or his attempt to kill Merrill Angel.

For the error indicated, the prisoner is entitled to have his cause tried before another jury, and it is so ordered.

New trial.

STATE v. AARON WISEMAN.

(Filed 20 December, 1919.)

1. **Removal of Cause—Transfer of Cause—Courts—Discretion—Appeal and Error.**

The order to remove a cause to another county for a fair and impartial trial is a matter within the discretion of the Superior Court judge, and will not be reviewed on appeal unless plainly arbitrary and oppressive.

2. **Homicide—Murder—Evidence—Capias.**

Where there is evidence tending to show that the prisoner was guilty of or participated with others who had been previously tried for the same crime, it is competent to show that on the former trial he was compelled to testify under a *capias ad testificandum*, as an unwilling witness, which, though having little weight in itself, was a circumstance to be taken with the other evidence in the case.

3. **Appeal and Error—Contentions—Instructions—Objections and Exceptions.**

Error in the misstatement of the trial judge of the contention of the appellant must be called to the attention of the judge at the time, to afford him an opportunity to correct it, or it will not be considered on appeal.

4. **Homicide—Murder—Burden of Proof—Instructions.**

An instruction upon the trial of a homicide to acquit the prisoner should the jury find the contentions of his counsel to be true, upon all the evidence, is not objectionable as relieving the State of the burden to show guilt beyond a reasonable doubt, when the judge has repeatedly, throughout his charge, emphasized this requirement.

5. **Homicide—Murder—Lying in Wait—Accomplice.**

Upon evidence tending to show that the prisoner singly, or with one or two others, awaited the train on which the deceased was to arrive after nightfall, the darkness increased by mist and clouds, and they or he continued to shoot him to death at close range as he was leaving the train, and went secretly and hastily away: *Held*, whether the prisoner alone, or with others, committed the homicide, the evidence is sufficient to be submitted to the jury upon the question as to whether the prisoner waylaid the deceased, within the meaning of the statute, and, with the other evidence in the case, to sustain a verdict of murder in the first degree.

6. **Homicide—Murder—Identity—Evidence—Questions for Jury—Trials.**

Where the evidence is conflicting as to the identity of the prisoner as the one who had shot and killed the deceased as he was leaving a train on which he had been a passenger, and there is direct and positive testimony of passengers on the coach as to the dress and appearance of the prisoner, seen from the light of the car windows, whose name they did not know at the time, but afterwards definitely knew, and identified, this question of identity is one of fact for the exclusive determination of the jury.

7. **Homicide—Murder—Motive—Evidence—Trials.**

Where, upon the trial for a homicide, there is evidence that the prisoner laid in wait for the deceased and fired upon and killed him, it is unnecessary to separately show the prisoner's motive for the killing by evidence independently directed to it, though such evidence may be a material element for the jury to consider in passing upon the prisoner's guilt, and its absence a circumstance in his favor.

8. **Homicide—Murder—Accomplice—Evidence.**

Where there is evidence tending to show that the prisoner and two certain others were lying in wait to assassinate the deceased, and that they fired ten shots in rapid succession, taking effect and causing death, an instruction of the court to the jury is correct, that if they found the facts accordingly the prisoner would be guilty of murder in the first degree if he was present at the time and acted in concert with and aided and abetted the others therein.

9. Homicide—Murder—Evidence—Second Degree.

Where the whole evidence tends only to show a murder accomplished by lying in wait and the deliberate and premeditated killing of the deceased, it is not error in the Superior Court judge to fail to submit to the jury any question as to the murder being in the second degree, for the verdict should be either murder in the first degree or an acquittal.

ALLEN, J., dissenting; BROWN, J., concurring in the dissenting opinion.

APPEAL by defendant from *Long, J.*, at May Special Term, 1919, of CLEVELAND.

Verdict of murder in the first degree, and sentence in accordance with law, from which the prisoner appealed.

Attorney-General Manning, Assistant Attorney-General Nash, and W. A. Self for the State.

J. W. Pless, Lambert & Lambert, Spainhour & Mull, and S. J. Ervin for prisoner.

CLARK, C. J. The prisoner was convicted of murder in the first degree of Dr. E. A. Hennessee, who was killed at Glen Alpine, N. C., just after he stepped off the westbound train, No. 21, about 6:30 p. m., 31 January, 1918, 10 bullets in rapid succession being fired at close range into his back and side—7 of them passing entirely through his body. At that point the railroad runs east and west, the station being on the south side of the track. The passengers on that night alighted from the train somewhat east of the station in the direction of Morganton. The train was about an hour late. The evening was overcast, it being warm and misty. The train arrived about 6:30 p. m., it being deep twilight. Dr. Hennessee was returning to his home at Glen Alpine from a trip to Greensboro. It seems that he was the first person to alight from the coach in which he was riding. Almost immediately one or more persons in the darkness opened fire upon him. There were 10 or 12 shots in rapid succession. His brother, M. N. Hennessee, who soon arrived on the spot, describes the location of the body as follows: "His body was 8 or 10 feet east of the platform, his head was towards the railroad, lying a little angling, lying nearly straight, with his feet south or southeast, in the direction of W. D. Pitts' store, which is about 60 feet from the railroad track. The head of Dr. Hennessee was something like about three feet from the track. He was lying on his face when I got there."

Dr. T. V. Goode described the wounds as follows: "He was shot 10 times. I don't remember how many went through; think it was five, probably. I'll have to refer to the notes. There were ten wounds, all entered from the back and side. I couldn't tell you how many passed completely through the body. One entered about three inches below the left hip joint in the back of the thigh, ranged downward and to the right, going through the left thigh at an angle, and through the right thigh, coming out three inches above the right knee cap, and a little to the outside. One entered the left hip four inches behind the joint, towards the median line; didn't come out; I couldn't tell the range of it; one entered four inches towards the median line from that one—that one didn't come out; I couldn't tell the course of that; the next one entered two and a half inches below the crest of the ilium, the hip bone, close to the spine—that didn't come out; that was on the left side; I couldn't tell the course of that; one entered one and a half inches from the spine on the left side, three inches above the angle of the shoulder bone, coming out in front, the left side of the breast bone, at its junction with the first rib. That was all on the left side of the spinal column. On the right side one entered one inch from the spine, two inches above the crest of the ilium, hip bone—that came out in front one and a half inches from the median line, left side, and two inches below the umbilicus (navel), ranging a little bit down; the next one entered four inches below the shoulder, about 5 inches from the spine on the right side, and came out on the left side, ranging almost straight through; the next one entered about the middle axillary line on the right side between the eighth and ninth ribs, ranging probably just a little bit up; next one entered two inches above the angle of the scapula and two inches from the spine, on the right side, and came out the edge of the sternum junction with the second rib, ranging practically straight through; next entered behind the right shoulder, one inch below, came out in front, just below the clavicle, ranging practically straight through." (Witness indicates on body of counsel the location of the wounds).

"I found four of those bullets when I made the examination, and Mr. Hennessee gave me one he had found; that made five that went through. I don't know that there were five that didn't pass entirely through the body; don't know that that is true; some might have been lost that went through. (Witness refers to notes and states that seven went through.) Three did not go through. I found those four that went through lying just inside his shirt; the other Mr. Hennessee said he took out of his tie."

The doctor further stated that practically all the wounds showed more or less powder burns, and that in order to make such burns the pistol would have to be within twenty inches of the victim. The train that night was composed of a combination baggage and passenger car in which the witnesses Ramsey and Amos were sitting, a passenger car immediately behind this, and a chair car at the end.

The conductor, Captain Sumner, was on the front platform of the combination car, while J. F. Laughter had charge of the passenger coach, under whose supervision the passengers got off and on the train.

It appears from the testimony that Dr. Hennessee was the first passenger to alight from the coach; that he walked around the two or three people waiting to get on the train, and started west towards the platform of the station. As soon as he got clear of this crowd, the man or men waylaying him opened fire upon him.

The State's evidence tended to show that the defendant Wiseman was, if not the sole assassin, certainly one of them. He was recognized by J. M. Ramsey as the man who was standing with two pistols in his hand, one a long, blue steel pistol, in one hand, and a nickel-plated one in the other, and he was emptying these pistols into the body of Hennessee as rapidly as he could pull the trigger. He testified:

"I could see a perfect outline of this man, the coat he had on, the pistols he had in his hands—had a blue pistol in one hand and a nickel-plated one in the other; had on a coat, just like a tan-colored raincoat, tan coat, which I could see very plainly; came between his knees and his shoes, about half way between his knees and the ground." And further on: "I couldn't tell the color of the hat he had on. It was a broad-brimmed hat. I didn't know who the man was at that time. I know now. It was Aaron Wiseman."

Fred Amos also recognized him: "On the 31st of January I was on train No. 21, the same train Mr. Ramsey was on; I was on the left side of the coach, next to the station at Glen Alpine, going west. I was about two or three seats in front of Mr. Ramsey. When the train stopped at the station at Glen Alpine, it hadn't stopped over 30 seconds, and I was attracted by what sounded like fire-crackers or shooting; at the same time cinders hit my window, and I turned in my seat, put my hand up and tried to raise the window at the same time, and I couldn't raise it, so I looked out and looked back this way at an angle and I saw a man with two pistols, shooting; one was a light pistol, looked like it was nickel-plated, and the other was a blue steel, I suppose. He was standing looking right down this way, he was slightly bent, and shooting down, looked like, under the train. That man had on a light-colored slouch hat and tan-colored raincoat or slicker of some sort; looked like it struck him below his knees—I didn't pay any great deal of attention to it.

"I know who the man was that I saw doing the shooting; it was Aaron Wiseman; I haven't the least doubt about it in the world; if I had any doubt I certainly wouldn't swear it. This defendant is the man I saw doing the shooting."

About the accuracy, reliability, and character of these two witnesses nearly all the other testimony in the case clustered: The State on the one hand introducing testimony to corroborate their statements, while the defendant, on the other hand, introduced evidence which tended to disparage and contradict those statements. The issue of fact thus made was passed upon by the jury. This Court reviews only alleged errors of law, or legal inference, committed by the judge, and we need not take time and space to analyze and discuss this testimony, whose admissibility was not excepted to.

The prisoner's first exception is to the order of removal from Burke to Cleveland County. This Court has always held that such order is a matter of discretion, and will not be reviewed unless plainly arbitrary and oppressive, which is not shown in this case. *S. v. Hayes Baldwin, ante,* p. 687.

Exceptions 2, 3, 4, and 5 are to the admission of testimony in regard to the prisoner's failure to attend court as a witness at the trial of the two Pitts boys for the murder of Hennessee, and that a *capias ad testificandum* had been necessary to compel his attendance, and of the service of that *capias* on him by the officers. The Pitts had been tried the year previous for the murder of Dr. Hennessee, and were acquitted. The evidence objected to was competent to show that the prisoner was an unwilling witness at that trial, and, while of little weight in itself, was a circumstance which the State was entitled to have submitted.

Exceptions 6 to 19, inclusive, are to the recital by the court of the contentions of the State, and upon examination we cannot find error therein. It was incumbent upon the prisoner to call any alleged error in such recitals to the attention of the court at the time. *S. v. Caylor, ante,* p. 807.

Exception 20 is to a paragraph in the judge's charge when, after stating the contentions of the prisoner's counsel, he said: "If you find from the examination of all the evidence in the case that these contentions of the prisoner's counsel are true, you will acquit him." The able and experienced judge, however, both before and after this statement, repeatedly stated to the jury that "the burden was upon the State to satisfy the jury beyond a reasonable doubt." This is often repeated and the jury could not by any possibility have understood this clause as being in any way in conflict with the well settled principle which he so often stated in the charge.

Exceptions 21, 22, and 23 were to the judge's charge defining "lying in wait," which was as follows: "When our statute speaks of murder perpetrated by lying in wait, it refers to a killing where the person who does the killing has stationed himself for private attack, or one who is lying in ambush for private attack. While being in ambush and concealed, watching and waiting for a victim, would comprehend what is meant by lying in wait, still it is not necessary for the assailant to be actually concealed. If he placed himself in a position so as to make a private attack upon his victim, so as to assail him, under circumstances when the person assailed did not know of his presence, or of his purpose, and in the darkness of the night, or when the ordinary darkness was obscured by clouds and mist, and under such circumstances when he makes a secret assault upon the person assailed and shoots and kills him, and flees without a disclosure of his identity—a killing under these circumstances would constitute a waylaying within the meaning of the statute."

This was in entire accord with all our authorities, *S. v. Walker,* 170 N. C., 716; *S. v. Bridges, ante,* p. 733. The evidence was uncontradicted that Dr. Hennessee, almost immediately on getting off the train, was fired upon by one or more persons, at short range, all the shots striking him in the back or in the side. The parties were evidently in wait for their victim, and whether one man alone did the firing, and one or two others were present, by a reasonable inference from the evidence, to point him out, or to keep the crowd off till their victim was slaughtered, or whether one man alone did the shooting; in any event, the killing, in any aspect of this case, was an assassination by lying in wait, and by taking the victim unawares without opportunity to defend himself. The chief, if not the only question in the case upon this evidence was as to the identity of the murderer, or murderers, who committed the act, and that was for the jury, upon the evidence, and was fully and earnestly argued to them by the many able counsel who represented the prisoner.

That the slaying was by lying in wait, is beyond question. The only question presented in this record is whether there was legal error committed in the trial, in which the jury found beyond a reasonable doubt the identity of the slayer with the prisoner.

The argument on behalf of the prisoner in this Court was almost entirely expended in urging that upon the evidence the prisoner should not have been convicted, but that is a matter which the jury was to decide, and as to which they were unanimous that there was no reasonable doubt of the guilt of the prisoner. There were two eye-witnesses, who testified that they saw him in the act of shooting Dr. Hennessee, and that there was no doubt of his identity. As to the claim that he could not have gotten on the train after the shooting, Pink Rabb, a witness for the prisoner, who was stated to be "a highly respectable man," testified that he had known Aaron Wiseman for several years, and that he came into the coach in which Rabb was sitting, who went up and sat down by him and talked to him. Rabb says: "When he came in the firing had ceased."

We do not find the claim that the judge committed errors in reciting the testimony sustained by an examination of the record, but if it had been it was waived by the prisoner, being contented with it at the time, for he made no objection when the judge would have corrected the error, if any, if called to his attention. This has often been held, and has been repeated at this term in *S. v. Caylor, ante,* p. 807, citing authorities.

The charge of the judge in regard to motive was correct. He said, giving the whole paragraph: "With regard to the question of motive for the commission of crime, the court further instructs you that if the evidence in this case fails to show the prisoner's motive for killing the deceased, this is a circumstance in his favor, which the jury should consider along with the other evidence, but if the jury finds, from all the evidence, direct and circumstantial, that the prisoner committed the crime charged, the jury are at liberty to find the prisoner guilty, whether any motive was apparent or not, because, while motive in the commission of a crime is a material element for a jury in considering it, yet if it is shown beyond a reasonable doubt that the crime was committed, it is not indispensable that the motive should be apparent to sustain a conviction."

In *S. v. Adams,* 138 N. C., 688, it was held: "The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer, but motive is not an essential element of murder in the first degree, nor is it indispensable to a conviction, even though the evidence is circumstantial," *Walker, J.,* saying (at p. 697): "It is not required that a motive should be shown under the circumstances required in the prayer. When the evidence is circumstantial, the proof of a motive for committing the crime is relevant, and sometimes is important and very potential, as it may carry conviction to the minds of the jurors, when otherwise they would not be convinced. This is all that is meant by the Court in the cases cited by counsel. *S. v. Green,* 92 N. C., 779. Murder may be committed without any motive. It is the intention deliberately formed, after premeditation, so that it becomes a definite purpose, to kill, and a consequent killing, without legal provocation or excuse, that constitutes murder in the first degree. The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer, but motive is not an essential element of the crime, nor is it indispensable to a conviction of the person charged with its commission. *S. v. Wilcox,* 132 N. C., 1143; *S. v. Adams,* 136 N. C., 620."

Garfield Pitts and Aaron Pitts had been acquitted of the assassination of Dr. Hennessee, and being thus protected, it was perhaps not unnatural that the prisoner on this occasion endeavored to show that they were the guilty men, but the jury believed the testimony of the two eye-witnesses, Ramsey and Amos, who were sitting inside the coach, and by the light thrown from the lamps therein could see the man who was doing the shooting better than those outside in the dark.

They testified positively that they saw the prisoner a few feet away when, with a pistol in each hand, he was shooting Dr. Hennessee, and there was also evidence that shots were fired into Hennessee's body after he was lying on the ground. There was evidence introduced by the prisoner tending to show that Garfield Pitts and Aaron Pitts were there at the time, and that after the killing they went over to W. D. Pitts' store. This in nowise contradicts the testimony of Ramsey and Amos that Wiseman was shooting Dr. Hennessee with two pistols, and that they recognized him. The testimony offered by the prisoner shows that the two Pitt boys were there. If they were coöperating with Wiseman in the assassination, and even if they also shot Hennessee when, from their position in the car, the witnesses, Ramsey and Amos, may not have been able to see them, this would in nowise lessen the guilt of the slayer, whom these two witnesses identified as Wiseman, and whom the jury believed.

There was much evidence, besides that offered for the prisoner, that the Pitts boys were present with Wiseman, to show coöperation. Wiseman lived in Avery County, some 30 or 40 miles from the scene of the assassination at Glen Alpine, yet 6 or 8 weeks before the murder of Dr. Hennessee, he was on his way to see W. D. Pitts, and so anxious to see him that night that Loven testified that he told him at Marion that if he missed the train he would hire an automobile. He was at Marion that afternoon just before the killing, with two pistols on his person, one of them large, and the other not so large, corresponding with the description of them by the two witnesses, who saw them in use when he was killing Dr. Hennessee. On his arrival at Glen Alpine he went direct to W. D. Pitts' store, where he got the cartridges. According to the testimony of the prisoner's own witnesses, he was at the place of the assassination that night, accompanied by one or both of the Pitts boys. He claims that after the killing he ran to the end of the train, trying to get on it, and then came back with two drummers to the entrance of the car where the body was lying, and that he got on the train at the same time they did, but one of these drummers (Stafford) testifies that he did not get on with them. Later, when subpœnaed as a witness for the State at the trial of the Pitts boys, he refused to appear and testified until arrested on a *capias*. After he was arrested and in jail he told E. A. Green: "I want you to phone for Bud Pitts (W. D. Pitts) to come down here at once," according to Mr. Scott's testimony.

It is not necessary to recapitulate the testimony, for that was a matter for the jury, and was ably presented to them by the numerous, zealous, able, and experienced counsel of the prisoner, one of whom had previously represented the prosecution on the trial of the Pittses, and therefore knew the evidence on both sides thoroughly, and could use it to best advantage.

It might be added that Sam Byrd and Jasper Reap, witnesses for the defendant, testified that they saw two men shooting at Dr. Hennessee on that occasion, but it was so dark that they could not recognize their faces. Byrd says he saw them turn to the body of the man and shoot him after he had fallen, and that one of the men went in the direction of Pitts' store. And he knows that he was one of the men that did the shooting. And he saw another man join him at the store, but he is not certain that he was one of those who fired; that he could not recognize the faces of either of the men. Reap says he did not know who was doing the shooting, but there were two men, and that after the shooting two men went towards Pitts' store. W. A. McSherry testifies that he was in the coach with Ramsey and Amos, but on the north side, and when the firing began he crossed over to the south side and saw one man shooting, with two streams of fire about 12 or 18 inches apart. From where he was in the coach it seems that by the light of the lamps he, like Ramsey and Amos, could see one man shooting distinctly, whereas, the witnesses outside in the dark could not do so. McSherry says that the man doing the shooting wore a tan colored coat.

On an occasion of this kind, when there was great confusion, there would naturally arise some conflict as to details, but in this there is nothing that contradicts the witnesses who say that they recognized the prisoner as the man they saw doing the shooting.

By the light from the car, the three men inside could see, and they testified that they saw distinctly one man in a tan coat firing, and two of them testified positively that the prisoner was that man. From their position they could see, it seems, only one man firing. The witnesses in the dark outside saw evidently objects below the window, shrouded in the darkness, for they did not recognize the faces of the two men whom they saw shooting, as they say, but this does not tend to contradict the evidence that the prisoner was shooting Hennessee, firing two pistols at close range. He may have had one or more coöperating with him, according to the testimony for the prisoner.

The charge of the experienced and able judge has been closely scanned, and we find it a clear and correct statement of the law applicable, and entirely fair to the prisoner and instructive to the jury in their search for the truth.

The remaining exceptions of the prisoner are to those parts of the charge which instructed the jury that if they were satisfied beyond a reasonable doubt that the prisoner was present, aiding and abetting Garfield Pitts and Aaron Pitts in the assassination of Dr. Hennessee, they should convict him of murder in the first degree.

The instructions to the jury on this point were as follows: "You are further instructed that, although you may find, as has been argued by counsel on both sides, that Garfield and Aaron Pitts assaulted Dr. Hennessee, and participated in the killing of Dr. Hennessee, and were afterwards tried in Burke Superior Court, and acquitted by a jury in Burke County, this would not be a bar to the prosecution of the prisoner in this case. Independent of what was the result of the trial in Burke County in the case of *S. v. Garfield Pitts and Aaron Pitts,* if the State has furnished you evidence in this case now on trial which convinces you beyond a reasonable doubt that this prisoner waylaid and deliberately shot and killed Dr. Hennessee, either alone or in concert with Garfield Pitts and Aaron Pitts, or both, he would be guilty of murder in the first degree, and you will so find. Or if you find that Garfield Pitts or Aaron Pitts, or both, waylaid and deliberately and with premeditation shot and killed Dr. Hennessee, and you also find beyond a reasonable doubt that the prisoner was present at the time, acting in concert with the person or persons waylaying and deliberately killing Dr. Hennessee, the prisoner, if he so acted in concert, would be guilty of murder in the first degree."

The following is the conclusion of the judge's charge, which evinces a careful and conscientious desire to be fair and just to the prisoner. He said: "It is the duty of the jury to determine carefully, upon all of the evidence as stated by the witnesses, whether the incriminating facts and circumstances from which they may infer guilt are proved beyond a reasonable doubt. The court cannot express an opinion to you as to what weight you shall give to the direct testimony of eye-witnesses, or to the testimony of a witness who testified to the circumstances, or to the testimony of any witness. This devolves on the jury, and they have that sole responsibility to hear the evidence, consider it, and find the facts from it as it may or may not address itself to their conviction. While the court cannot intimate in the slighest degree what weight you should give to the testimony of any witness, and does not do so, it is proper to call your attention to the fact that in weighing the testimony of a witness the jury has the opportunity to see the witness on the stand, and to observe his demeanor on the stand; in weighing his testimony the jury may also consider his mental capacity to comprehend the facts to which he is testifying, or his lack of mental capacity; also whether he had a good opportunity to observe and to know the particular facts to which he testifies, or the reverse; whether the memory of the witness appears to you to have been good, or the reverse; whether the character of the witness is good or bad; whether the witness is shown to have any motive whatever to misrepresent what he states, or whether he is shown to have been without prejudice or passion, and without private or personal interest to advance; whether his narration of the incidents is consistent with the main facts shown, or is borne out by other circumstances; whether his testimony is supported by concurrent or correlated testimony and circumstances, or whether his testimony is contradicted by other witnesses, or by circumstances shown in the case.

"These cautionary suggestions made to the jury by the court are made only for the purpose of indicating to you some of the elements of probability or improbability as affecting the proof of facts and circumstances, but as I have stated to you, not for the purpose of in anywise intimating to you anything whatever as to the weight which you shall give the testimony of any witness.

"As I have stated to you heretofore, to justify a conviction of the prisoner you must be satisfied of the truth of the charge beyond a reasonable doubt. A reasonable doubt is not a mere whim or surmise, or conjecture, or a capricious speculation, or captious doubt arising from something extraneous to the evidence in the cause, but a reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jury in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

"With the instructions given, if you are satisfied beyond a reasonable doubt of the guilt of the prisoner, as contended for by the State, your verdict will be guilty of murder in the first degree, as charged in the bill of indictment. But, on the contrary, if you have a reasonable doubt of the guilt of the prisoner, upon all of the evidence, your verdict will be 'not guilty.'"

One of the counsel for the prisoner, in the oral argument in this Court, suggested that the judge should have submitted to the jury the phase of murder in the second degree. The able and learned counsel for the prisoner took no such exception, and there was nothing to justify it, if it was before us for discussion. There was no question that Dr. Hennessee was shot down in the deepening twilight, just after he had gotten off the train, and was killed by some person or persons the muzzle of whose pistol or pistols were within 20 inches of his body, and that he was shot in the back and side, and in all received 10 bullets in his body. There was no evidence of provocation, or of an altercation, or of self-defense. The whole evidence showed a premeditated assassination by one or more persons. The question before the jury below was almost solely as to the identity of the prisoner as the man who shot him, or who was present, aiding and abetting those who did. It was one of those cases in which there was no doubt as to the manner of the killing, and the court might well have charged the jury, though it did not do so, that "the prisoner was guilty of murder in the first degree or nothing." This would have been strictly in accordance with the testimony, and numerous precedents. *S. v. McKinney,* 111 N. C., 684; *S. v. Cox,* 110 N. C., 503; *S. v. Byers,* 100 N. C., 512; *S. v. Jones,* 93 N. C., 611, and numerous others.

The testimony as to the identity of the prisoner is lengthy, and was ably and fully argued to the jury, who found it sufficient to satisfy them beyond a reasonable doubt that the prisoner was the guilty man. It can serve no purpose to repeat and consider the weight which should be given to the evidence. This was a matter for the jury, and was amply sufficient to be submitted to them, together with the evidence which the prisoner contended should cause them to have a reasonable doubt as to his identity. The argument here for the prisoner was almost entirely that which must have been admitted to the jury, as to whether the evidence should convince them of the identity of the prisoner as the man who slew Dr. Hennessee, or who was present, aiding and abetting those who did. The only evidence excepted to, as above stated, was as to the pertinency of the evidence as to procuring the attendance of the prisoner when summoned as a witness on the trial of the two Pittses for the year before for the murder of Dr. Hennessee.

Our province is not to review the evidence and determine how far the jury was warranted thereby in finding beyond a reasonable doubt the identity of the prisoner as charged in the bill of indictment. It is for us to consider only the errors of law assigned, and after a careful consideration we find therein

No error.

Allen, J., dissenting: If I did not have grave doubts of the guilt of the defendant, and did not think there was serious prejudicial error in the instructions to the jury, I would acquiesce in the judgment of the court, because it is unfortunate to have a sentence of death affirmed by a bare majority vote, but, entertaining the views I do, I must give expression to them, and in order that the materiality of the instructions, which I think are erroneous, may be understood and appreciated, it is necessary to review the evidence.

Dr. Hennessee was killed on the night of 31 January, 1918, as he alighted from the train at Glen Alpine. The train was an hour late, and did not reach the station until 6:30 o'clock. It was deep twilight and warm and misty. Dr. Hennessee, one other man, and two ladies left the train.

There is not the slightest evidence or suggestion of any motive on the part of the defendant to kill the deceased, nor does it appear that he had ever seen him before the night of the killing (they lived thirty or forty miles apart), but, on the other hand, there was a keep hatred existing between the Pitts family and the deceased, because Dr. Hennessee had killed one of the family about five years before.

Mr. Hennessee, a brother, testified: "My brother had had trouble with the Pittses; had a fight there about five years before.

"Q. Gorman Pitts was killed in that trouble? A. He died afterwards in consequence of the wound—wounded and died. That was a fight between my brother and the Pittses. Five years before this, I believe. My brother had been indicted and tried for the murder of Gorman Pitts, and he was acquitted. Then later he was killed, and this indictment was against Aaron and Garfield Pitts.

"Q. You do know that there was very bad blood between the Pittses and your brother. A. Didn't seem to do any business at all; they didn't have any dealings with each other; didn't speak when they would meet in the road; that had gone on for a number of years.

"I suppose there was a bitter feeling between them. That there was really a feud between them was talked in the country."

There is no evidence that any one was standing near enough to the person who did the shooting to point out Dr. Hennessee as he left the train.

Why, then, should the prisoner, without provocation, kill a man he did not know, and why did he shoot Dr. Hennessee, whom he had never seen, instead of the other man, who got off the train immediately behind him?

The only witnesses relied on by the State to identify the defendant as the guilty person are Ramsey and Amos, and without their evidence the verdict could not be permitted to stand.

Both of these were on the train, and were looking through the window glass.

Ramsey testified, among other things: "Just as the train stopped, about the time, I heard a shot; as I heard it I put my eyes up to the window and looked out; as I did I could see a man's face just in the shadow of the light; you know how the light comes down out of the train, wide at the bottom and comes up narrow through the window; I could see a man about 15 feet from me, and something like 12 or 15 feet from the train, almost at an angle of 45 to 60 degrees, out from me to the train, and as he approached he shot just as fast (indicating), bang, bang, bang, bang, just like that; I saw some one right out of the door; couldn't tell whether it was a man or who it was, or whether they ran forward, backward or down, but as this man continued to shoot, he came towards the train round towards my window, he appeared to be shooting under the train; and as he finished shooting he was in the light, plain up right along his neck, between his chin and his shoulders; I could see a perfect outline of this man, the coat he had on, the pistols he had in his hands—

had a blue pistol in one hand and a nickel-plated one in the other; had on a coat, just like a tan-colored raincoat, tan coat, which I could see very plainly; came between his knees and his shoes, about half way between his knees and the ground. I couldn't see whether he had on his shirt, and couldn't see his face for his hat; if I had known the man I could have told who he was very easily, but not knowing him I couldn't. Just as he finished shooting he commenced to snap the pistols, and I ran to the door of the train to get out, and the officer of the train said, 'You can't get off,' reached up to pull the bell cord, and I went back to my seat, and put my hands up and looked out, and as the train was moving off that man was still standing there where he was when I left the seat to go back to the door. I couldn't tell the color of the hat he had on; it was a broad-brimmed hat. When I put my hand up to the glass to look out I could tell perfectly plain what was taking place on the outside. I didn't know who that man was at that time. I know now. It was Aaron Wiseman."

There are six statements to be noted in this evidence: (1) That the man who shot was 15 feet from the witness, and 12 or 15 feet from the train; (2) that he held a pistol in each hand; (3) that the witness couldn't see his face for his hat; (4) that only one person, and not one or more, was shooting; (5) that after the shooting ceased the witness went to the rear door of the coach to get out, and when he was not permitted to do so he returned to his seat, and the man who did the shooting was still standing there, and the train was moving; (6) that he says he "could tell perfectly plain what was taking place on the outside."

There is evidence of the good character of this witness, but he stands discredited on the record.

He testified: "I had never seen Wiseman before. I recognized Wiseman as the man that did the shooting on the day he was a witness in the Pitts' case. He was on the other side and I was for the defense; when he walked on the witness stand I recognized him, the outline of his body, the movement as he walked. On that I swear that is the man, just as positive as I am that I am sitting here."

Passing by any discussion of the character of a witness, who, when human life is at stake, will identify so positively a person whom he had never seen before, and when the only marks of identity were "the outline of his body, the movement of the body," the witness was examined as a witness in behalf of the Pitts boys, who were on trial charged with the murder of Dr. Hennessee, and he did not then tell on the witness stand that Wiseman was the guilty party, although the disclosure, if true, would have resulted in their acquittal.

There is evidence that he told one other of his recognition of the defendant; also one of the counsel for the Pitts boys, but the last is contradicted, and does not seem to be reasonable, as no counsel would fail to avail himself of so important a fact in defense of a client on trial for his life.

The witness was on the second-class coach, and he testified that he went to the rear platform *after the shooting,* and then returned to his seat, and the man was *still standing there* and the train *moving.*

He also testified: "I went to the door of the rear of the coach; the officer of the train met me at the door of my coach, and I said, 'Let me get out, Cap,' and he said, 'You can't get out; going to pull out,' and he reached up and pulled the bell cord, and as he did that I ran back to my seat. I think he closed the door. I said he was closing the door."

Laughter, the flagman of the train, testified: "Two doors of that train were opened that night, the front end of my car, first-class car, and the front end of the second-class car; the second-class car was the next in front of me. No door was open behind the door I had charge of."

This evidence of the flagman is uncontradicted, and it shows that only two entrances to the train were open, one behind the witness Ramsey at the front of the first-class car, and one in front of the second-class car.

It is also corroborated by the evidence of J. E. Stafford, a witness for the State, who, with another commercial traveler, Kelly, was at the station to take the train. He says: "As Dr. Hennessee stepped down and walked around the shooting began, and I said to Mr. Kelly, 'Let's run to the other end and get on,' and we did, and the train began moving, and Mr. Kelly said, 'Let's go back up and get on,' and I ran back up and jumped on the train right over Dr. Hennessee's head." Also, "I got to the chair car when the train started, and I saw it was locked and I turned and ran back to the first-class car. I knew I was the last man that went in at that door because the flagman had my suitcases and I talked to him, and he closed the door."

The evidence of Ramsey, if believed, establishes the fact that the entrance to the first-class car was closed before he returned to his seat, and he does not say any one passed his line of vision going to the platform of the second-class coach. On the contrary, he says "the train was not going five miles an hour; couldn't have moved more than ten feet until he was out of my vision," and if this is true, and the door of the first-class car was closed, the man who did the shooting was left at Glen Alpine, and did not enter the train. He could not have gotten on the chair car, because Stafford swears the door of that car was locked.

And still there is no denial of the fact that the defendant Wiseman was a passenger on the train that night from Glen Alpin to Marion.

The ticket agent swears he sold Wiseman a ticket about 5:30 o'clock. Mr. Rabb, a witness of high character, testified as to what occurred at Glen Alpine: "I saw Aaron Wiseman that night in the coach I was in;

he came in and sat down on the first seat; he came in while the train was there. I went up and talked to him a little; sat down by him. I had known him a few years before that. When he came in the firing had ceased. I don't remember how many drummers came in with him; two drummers came in. I don't know how far he rode on that train; I went to Marion. I couldn't tell you whether Wiseman came in when the train was in motion or before it started"; and W. M. Ramsey, who lives at Marion, testified that the defendant spent the night of the killing of Dr. Hennessee at his home.

The witness Amos, who was two or three seats in front of Ramsey, testified that he knew the defendant, and that he was the man who killed Dr. Hennessee.

There was evidence of his good character; and also evidence that his character was bad.

He admitted that so far as he knew he was the only one who recognized Wiseman; that he knew the Pitts boys were in jail, charged with the murder; that they were on trial for their lives, and still he did not tell any one that Wiseman was the guilty party until eleven months thereafter.

He also testified: "I recognized Wiseman. The train didn't have to move much to get him out of my sight; I was looking out of the window; I didn't get out of my seat; he was still standing there the last time I saw him."

It thus appears that both Ramsey and Amos, without whose testimony the State could not ask for a conviction, leave the man who did the shooting standing still at Glen Alpine when all the doors of the train were closed; that he passed out of their vision as the train moved forward; and the evidence shows conclusively that the defendant Wiseman was then on the train.

The least that can be said is that these witnesses were mistaken.

There are other remote circumstances relied on, but the case of the State must stand or fall on the evidence of these two witnesses, which shows, if it can be relied on at all, that *one* man, and not two or one or more, killed Dr. Hennessee.

The defendant introduced Sam Byrd, who was proven to be of good character and not related to the defendant, who testified: "When 21 stopped at the station I was standing on the east end of the platform of the depot. I saw Dr. Hennessee; he stepped from the train and started towards me.

"When the train stopped I was about the first besides those that alighted from the train. He started towards me and I started towards him; we had made to or three steps towards each other; were between 10 and 15 feet from each other, and two men appeared from behind Dr. Hennessee and began shooting; they fired, I would say, four or five shots, and there was a pause, and, seemingly, they turned apart of the way around as though they were going away, and suddenly turned back and began firing again; two men were shooting; they turned to the body of the man which was lying on the ground at that time, and fired several more shots, possibly five or six other shots; and when they ceased firing they turned and left the body; one of the men went around in a circle towards me, and went in the direction of W. D. Pitts' store, which is just south of the train and the station, just below the dirt road; the other man started back the other way, around the crowd, and just about the middle of the public road the two men came together and continued in the direction of W. D. Pitts' store; the last I saw of the men was just about two or three steps of W. D. Pitts' store door.

"Just as the men that did the shooting came right up close to the body, in hand-reach of Dr. Hennessee, they appeared from the darkness behind; I couldn't see where they came from. Both parties were shooting at the same time. The men were side by side, as close as two men could stand, as well as I could see."

Note, according to this evidence, (1) two men did the shooting; (2) they were in "hand-reach" of Dr. Hennessee; (3) after the shooting they went to the Pitts' store, and neither got on the train.

Jasper Reap, who was standing by Byrd, testified: "When the train stopped the shooting commenced, and they shot gravel in my face. I don't know who was doing the shooting; two people were shooting when I saw them; shooting at Dr. Hennessee. At the time the shooting began Dr. Hennessee was 12 or 15 feet from me, east from me. When they began to shoot at him I reckon he was 8 or 10 feet from the side of the coach. The two men shooting at him looked like tall, slim men; one stood pretty close to his feet, and the other about four feet from him.

"Q. How close behind Dr. Hennessee? A. Right at his feet. I couldn't tell how many times they shot; I suppose two rounds of shot—about ten shots, I suppose. The shooting was so fast you couldn't tell much about it, both guns firing the same time. These two men shooting were about four feet apart, and close to Dr. Hennessee. When the shooting stopped the two men turned and walked off towards W. D. Pitts' store."

Miss Ellen Trexler, who was a passenger on the train, testified: "When the train stopped at Glen Alpine Dr. Hennessee got off first, Lum Branch followed Dr. Hennessee, I followed Lum Branch, and then Miss Smathers followed me—that is all that got off of that car. I heard some shooting. When I heard the first shot I was coming out of the train, just before I got to the door. Just as I got to the last step the last shot was fired, and I saw two men run towards W. D. Pitts' store, and then

I went home. I left the station before the train did. I just saw one shot. Just directly after the last shot was fired the two men left going towards Pitts' store. The men I saw shooting went towards Pitts' store. One was wearing a long black slicker or raincoat, and had a hat pulled down over his face; I couldn't tell how the other was dressed."

Patton, the railroad agent, said he heard the shooting, and "went out there and two men were standing there—Sam Byrd and Jasper Reap—and I asked who got killed, and they said they didn't know, but said the ones that killed him went towards W. D. Pitts' store, in that direction; then I went immediately down to the store; I went pretty fast; trotted down there, run, I think; I pushed on the door and tried to get in, and it was fastened on the inside, and I couldn't in; there was a dim lamp light in the store; then I looked in the window and seen Garfield Pitts with a pistol in his hand like that (indicating); it was a bright-looking pistol; looked like a large pistol; it was pointed directly towards the door."

J. F. Stafford, a witness for the State, who boarded the train at Glen Alpine, testified: "Dr. Hennessee had walked five of six or eight feet before the shooting began, it began firing as he was back of me, five or six feet. I saw the flash from two guns. I thought two men were using them. The men I thought had done the shooting walked from the depot towards W. D. Pitts' store; were 30 or 40 feet from the train; it seems they were near the steps of the little porch."

Dr. Goode, who examined the body of the deceased, testified that the shot entered the back and side; that nearly all had powder burns, and that a pistol would have to be held within 16 or 20 inches of the body to make such burns.

These are the material parts of the evidence, and, to my mind, they present two questions for the jury: (1) Are you satisfied beyond a reasonable doubt the defendant killed the deceased? (2) If so, are you satisfied beyond a reasonable doubt the killing was with premeditation and deliberation?

But counsel for the State saw in these two simple questions not only the possibility, but the strong probability of an acquittal, so they evolved the theory of a conspiracy between the defendant and the Pitts boys, and in response to this position of the State, his Honor charged: "If you find, however, that when Dr. Hennessee alighted from the railroad train he was assaulted with pistols from behind or on the side, by Garfield Pitts and Aaron Pitts, and that the Pitts boys, one or both, deliberately and premeditatedly shot and killed Dr. Hennessee, and you further find that the prisoner, Aaron Wiseman, was at the time in company with and in the presence of the said Pitts boys, and that he was actually coöperating with them, or aiding, abetting, and encouraging them in deliberately shooting and killing Dr. Hennessee, the prisoner, under such finding by you, would be guilty of murder in the first degree."

This was repeated several times, and doubtless brought about the conviction of the defendant, and it is not only contradictory of the evidence of the State, that one man did the killing, but it has no evidence to support it.

The learned counsel for the State undertake to enumerate all the circumstances tending to show a conspiracy as follows:

"The defendant Wiseman lived in Avery County, some 30 or 40 miles from Glen Alpine, yet we find him six or eight weeks before the murder of Dr. Hennessee, on his way to see W. D. Pitts, and so anxious to see him that night, that, if he missed the train, he would have to take an automobile. We find him at Marion the afternoon before the killing that night before 12 passed the town, with two pistols on his person, one of them large and the other not so large. We find him, on his arrival at Glen Alpine, going direct to the W. D. Pitts' store, where he got cartridges. We find him, admittedly, at the place of the killing that night, accompanied by one or both of the Pitts boys. After the killing we find him claiming to have run to the end of the train trying to get on it, and then coming back with two drummers to the entrance where the body was lying, and getting on the train at the same time that they did; yet we find one of these drummers, J. F. Stafford, testifying that he was not with them when they got on, and that he would have known it if he had been. We find him later, after he had been subpœnaed as a witness for the State, at the trial of the Pitts boys, refusing to appear and testify until after he was arrested under a *capias.* We find him after he was arrested and in jail telling Mr. F. A. Green, 'I want you to phone for Bud Pitts (W. D. Pitts) to come down here at once.'"

This enumeration shows the straits to which the State is reduced to furnish evidence of a conspiracy.

If we eliminate "Yet we find," "so anxious," which are but the inferences of counsel, the statement that the defendant was at the station, "accompanied by one or both of the Pitts boys," which has nothing to sustain it except evidence that all were at the station, and the circumstances of having pistols at Marion, claiming to have run to the end of the train to get on when others testified he did not do so, and failing to appear as a witness against the Pitts boys, which may tend to show guilt, but not a conspiracy, we have nothing except that six or eight weeks before the killing the defendant said he was going to see W. D. Pitts, and if he missed his train he would hire an automobile; that on the evening of the killing he went to the Pitts store and bought cartridges; that he stayed awhile by the fire; that he left and went to the depot; that Garfield and Aaron Pitts were at the depot, as were four or five others, and that after his arrest he asked some one to phone for W. D. (Bud) Pitts; and there must be still further elimination of circumstances, because W. D. Pitts lived a mile from Glen Alpine, and there is no evidence that he was in the town the evening of the killing or that the defendant saw him.

The evidence of a conspiracy then comes to this, that the defendant went to the Pitts store and bought cartridges; that he stayed some time by the fire because the train was late, and there was no fire at the depot; that he left the store to take his train; that Aaron and Garfield Pitts also went to the train, and upon this he is told that if Aaron or Garfield or both killed Dr. Hennessee he must suffer electrocution.

Upon the same theory I do not see how the two drummers, who took the train at Glen Alpine that night, have escaped as they were doubtless in the Pitts store, and they were at the train with Garfield and Aaron Pitts.

As I understand the record, the instruction is erroneous, because there was not only no evidence to support it, but the circumstances rebut the idea of a conspiracy. The visit to W. D. Pitts six or eight weeks before is fully explained, but without explanation nothing criminal is shown, and the fact that the defendant was proclaiming that he must see Pitts that night; that he sat openly in the Pitts store on the evening of the killing, tend to show that there was no conspiracy.

Again his Honor charged the jury: "With the instructions given, if you are satisfied beyond a reasonable doubt of the guilt of the prisoner as contended for by the State, your verdict will be 'guilty of murder in the first degree, as charged in the bill of indictment.' But, on the contrary, if you have a reasonable doubt of the guilt of the prisoner, upon all of the evidence, your verdict will be 'not guilty,' " to which the defendant excepted, thus preventing the jury from considering murder in the second degree, and this is error if there is evidence of murder in the second degree.

"Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in perpetration, or attempt to perpetrate, any arson, rape, robbery, burglary, or other felony, and where there is no evidence, and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt, or of 'not guilty.' If, however, there is any evidence, or if any inference can be fairly deduced therefrom tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury. It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can fairly be deduced therefrom, tending to prove one of the lower grades of murder. This does not mean any fanciful inference tending to prove one of the lower grades of murder; but, considering the evidence 'in the best light' for the prisoner, can the inference of murder in the second degree or manslaughter be fairly deduced therefrom." *S. v. Spivey,* 151 N. C., 685.

The question is not whether there is evidence of murder in the first degree, which I concede, but is there any evidence of murder in the second degree, and this depends on whether, "considering the evidence in the best light for the defendant," the inference can be fairly deduced that the murder was not done by one "lying in wait," or stated, perhaps, more accurately, is there any inference that can reasonably be drawn from the evidence except that the person who killed Dr. Hennessee was "lying in wait," which, " 'according to Bouvier, is being in ambush for the purpose of murdering another. It implies a hiding or secreting of one's self.' *State v. Olds,* 24 Pac., 394, 403; 19 Or., 397.

"To constitute lying in wait, within the meaning of Acts 1829, ch. 23, par. 1, providing that all murder perpetrated by means of lying in wait shall be murder in the first degree, three things must concur, to wit, waiting, watching, and secrecy. *Riley v. State,* 28 Tenn. (9 Humph.), 646, 651." 5 Words & Phrases, 4262.

Assuming for the present that the defendant killed the deceased, the evidence is that he bought a railroad ticket at 5:30 o'clock, thus giving notice that he might be expected at the train; that he was standing "in the open," so that two persons on the train, Ramsey and Amos, saw him; that Sam Byrd, Jasper Reap, and Garfield and Aaron Pitts, Stafford and Kelly, were within twenty feet of him; Sumner, the conductor, and Patton, the railroad agent, within ninety feet; Laughter, the flagman, within thirty feet, and that Dr. Hennessee, Lum Branch, Miss Trexler, and Miss Smathers left the train during the shooting within fifteen feet of him.

It also appears that it was only "deep twilight," and Ramsey, the principal witness for the State, says: "I could tell perfectly well what was taking place on the outside."

If the only inference from this evidence is a killing by "lying in wait," I have no conception of the term, and if there is any other inference the defendant is entitled to a new trial.

Again, his Honor charged in reference to motive: "With regard to the question of motive for the commission of crime, the court further instructs you that if the evidence in this case fails to show the prisoner's motive for killing the deceased, this is a circumstance in his favor, which the jury should consider along with the other evidence; but if the jury finds from all the evidence, direct and circumstantial, that the prisoner committed the crime charged, the jury are at liberty to find the prisoner guilty, whether any motive was apparent or not, because, while motive in the commission of a crime is a material element for a jury in considering it, yet if it is shown beyond a reasonable doubt that the crime was committed, it is not indispensable that the motive should be apparent to sustain a conviction."

This is objectionable in two aspects. In the first place it leaves the question of motive to the jury, when no one contends there is any evidence of motive, and the defendant was entitled to have the court so instruct the jury, and in the next place it is very close to an expression of opinion that the defendant killed the deceased.

What did the jury understand when his Honor said "if the evidence in this case fails to show the prisoner's motive for killing the deceased" except that he thought the prisoner killed him?

There are several statements made while stating the contentions of the parties, which, while they may not be ground for a new trial, because not called to the attention of the judge at the time, were very harmful.

He said the State contended that Amos was corroborated by the evidence of Joe Tallent; that Amos "told him that he recognized the man who was firing two pistols on the night of the tragedy," when Joe Tallent made no such statement, and Amos said, "I was in a conversation with a man named Tallent. I said that I was on the train that night; know I said that much. That's about all I thought I told him; that's all I recall now."

The importance of this will be recognized when it is remembered that Amos was the most material witness for the State, and that he was sadly in need of corroboration.

He also stated as a corroborating circumstance: "The testimony further of the prisoner's witness, Dr. T. V. Goode, whose examination of the wounds indicated that the greater part of them were fired at close range, and that most of them were probably fired by one person holding two pistols, or by two persons standing near to each other," when you will search in vain for such a statement by Dr. Goode. This was material, because it was the beginning of the effort to connect the defendant with some other person. He further said: "The State further contends that all the material evidence, including that of Ramsey, Amos, McSherry, and M. N. Hennessee, for the State, and that of Miss Ellen Trexler for the prisoner, tends to show that one person engaged in the assault of the deceased wore a dark brown or tan overcoat or raincoat, and that the only person at all about the station at Glen Alpine at that time of the tragedy who wore a coat of such description was the prisoner now on trial, and the State contends that from this evidence the jury ought not to entertain a reasonable doubt as to the identity and guilt of the prisoner now on trial."

Mr. N. Hennessee was not at the station; did not see the man who shot, and did not testify that "one person engaged in the assaulting" of the deceased wore a dark brown or tan overcoat or raincoat, and Miss Trexler testified: "One was wearing a long black slicker or raincoat."

For these reasons I think there ought to be a new trial in the interest of human life.

BROWN, J., concurs in this opinion.

STATE v. L. J. CAYLOR.

(Filed 20 December, 1919.)

1. **Appeal and Error—Objections and Exceptions—Evidence—Instructions—Misstatements—Larceny—Criminal Law.**

   An inaccurate statement of the evidence by the judge in his charge to the jury must have been called to his attention at the time by the party complaining to have afforded him an opportunity to make whatever correction that was necessary, or an exception thereto will not be considered on appeal.

2. **Instructions—Larceny—Criminal Law—Subsequent Conduct—Defenses.**

   An instruction upon supporting evidence that if the jury found that the defendant committed the crime charged, whatever he afterwards may have done was neither a defense or condonement of it in law, is a proper one.

3. **Larceny—Indictment—Description—Refinements—Statutes.**

   An indictment charging larceny of lumber at a certain place, and the name of the owner, is sufficient to identify the property, show it was of value, and protect the defendant on another charge of the same offense, the former technicalities or refinement of the law being now abolished. Rev., 3254. The procedure being for the defendant to apply for a bill of particulars if he desires more definite information. Rev., 3244.

INDICTMENT for larceny, tried before *Ray, J.*, and a jury, at July Term, 1919, of SWAIN.

The defendant was indicted for the larceny of lumber of the value of $200, the property of A. T. Dorsey. All of the evidence was not sent up. From the little that is here, we gather that the lumber was stacked or piled in different places. The record discloses "that the lumber (alleged to have been) stolen, was piled up in the barn, in the house, under the porch, under the crib shed, and neither was locked, and was near the road, where Dorsey's hands passed and repassed, and where it could easily be seen by anybody passing that way."

Defendant was convicted, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Dillard & Hill, Sherrill & Harwood, and Frye & Frye for defendant.

WALKER, J. We must assume that there was evidence of the defendant's guilt, as there is no point made as to there being none, the only assignments of error being to the charge of the court and the refusal to arrest judgment, except those that are merely formal.

1. If the judge stated the evidence to the jury incorrectly, the defendant should have called his attention to it, so that it could be corrected at the time. Failing to do so, waives any objection to it, as a similar omission waives the misstatement of a contention. *S. v. Spencer*, 176 N. C., 709; *Bradley v. Mfg. Co.,* 177 N. C., 153.

2. The court did not err in the instruction that if the defendant had fully committed the crime, what he did afterwards was no defense and no condonement of it in law.

3. The property was sufficiently described in the indictment under our statute, Rev., 3254. The rule is that "where raw material has been changed to some extent by labor, it may nevertheless still be called by the name of the material, provided it has not been wrought into a new substance with a specific name to designate it. When, however, the product has a specific or distinguishing name, that name must be used to describe it." 25 Cyc., 76. "The description in an indictment must be in the common and ordinary acceptation of property, and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny, and also to protect the defendant in any subsequent prosecution for the same offense." *S. v. Campbell*, 76 N. C., 261; *S. v. Nipper*, 95 N. C., 653; *S. v. Martin*, 82 N. C., 672. The Court, in those cases, says that the former nice distinctions and technical refinements of the common-law courts, when punishments were so severe, have been abolished more recently, and especially by our statute mentioned above, because they frequently defeated the ends of justice. The Court, in *S. v. Campbell, supra*, adds: "The description must still be in a plain and intelligible manner, and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other farm, etc., when stolen, it must be described by the name by which it is generally known." *Justice Reade* says, in *S. v. Harris*, 64 N. C., 127, that "the object of describing property stolen by its quality and quantity, is that it may appear to the Court to be of value. The object of describing it by its usual name, ownership, etc., is to enable the defendant to make his defense, and to protect himself against a second conviction.

In the case under consideration, the substance of the charge is stealing flour—fifty pounds of flour—from which it is apparent that it was of value; and the exact quantity and value need not be proved. The objection made is that it was a 'sack of flour'; by which we understand flour in a sack or bag. If the defendant stole the flour, it makes no difference whether it was in a sack, or bag, or box, or lying about loose. It was of value, and its character was not changed. An indictment charged the stealing of 'a parcel of oats'; held to be sufficient. So another indictment charged the stealing of a 'hog'; the proof was a shoat; held to be sufficient." See *S. v. Clark,* 30 N. C., 226.

We are of the opinion that, within the principle prevailing in such cases, the description of the article stolen was sufficient. It was laid in the name generally applied to it in the trade, and in common parlance. It does not appear to have gone beyond the process of manufacture, and to have been worked into any new form which has a specific designation or name. The defendant could not have been misled or disconcerted in his defense, or put to any disadvantage. If he desired more particular information, he should have applied for a bill of particulars. Rev., 3244; *S. v. Brady,* 107 N. C., 822.

Chief Justice Ruffin, in *S. v. Moses,* 13 N. C., 464, said: "The law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality, and refinement which do not concern the substance of the charge, and the proof to support it. Many of the usages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, and especially those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them, and only require the substance, that is, a direct averment of those facts and circumstances which constitute the crime, to be set forth."

The Court, in *S. v. Smith,* 63 N. C., 234, held that our statutes have received a very liberal construction in accordance with their evident purpose to relieve our criminal procedure of many of the ancient technicalities which have become obsolete and useless, and "its efficacy had reached and healed numerous defects in the substance, as well as the form of indictments," and that the courts have looked with no favor on technical objections and nice distinctions, which are not conducive to an efficient and practical administration of the law—and the Legislature has been moving fast in the same direction. "The current is all one way, sweeping away by degrees 'informalities and refinements,' until a plain, intelligible and explicit charge is all that is now required in any criminal proceeding."

The defendant must have understood very clearly the charge in the bill of indictment, and certainly was not unprepared to defend himself against it, and we should obey the statute and not permit what *Lord Hale* and *Chief Justice Ruffin* called an "unseemly nicety" to defeat the ends of justice. *S. v. Moses, supra,* at pp. 468, 469; *S. v. Ratliff,* 170 N. C., 707.

We are unable to find any error in the case or record.

No error.

STATE v. ALBERT KIRKLAND.

(Filed 20 December, 1919.)

1. **Larceny—Definition—Criminal Law—Instructions—Appeal and Error—Reversible Error.**

Larceny is the wrongful taking of the property of another with the intent to permanently deprive the owner, by the taker's converting it to his own use or for the benefit of a third person; and a charge to the jury that the intent is not an essential element of the offense, but that depriving the owner of the possession is sufficient, or that feloniously, in this sense, is doing an unlawful act willfully, is prejudicial and reversible error.

2. **Criminal Law—Instructions—Evidence—Appeal and Error—Reversible Error.**

An instruction upon a criminal trial that if the contentions of the defendant satisfied the jury beyond a reasonable doubt, to render a verdict of acquittal is erroneous, the defendant having a right to an acquittal if they find in his favor upon all the evidence, that of the State, as well.

3. **Appeal and Error—Evidence—Nonsuit—Record.**

The Supreme Court, on appeal, will not pass upon a motion for judgment as of nonsuit upon the evidence when the record shows that all the material evidence for its consideration was not set out therein.

APPEAL by defendant from *Ray, J.,* at the July Term, 1919, of SWAIN.

This is an appeal from a judgment pronounced upon a verdict of guilty of the charge of the larceny of certain lumber, the property of A. T. Dorsey.

There was evidence that about three years ago the prosecuting witness, Dorsey, procured a right of way from the defendant to erect and operate a flume over defendant's land for transporting lumber and wood, which was afterwards erected and operated by Dorsey. The flume ran something like one-half mile over the defendant's land, and prior to and at the time of the alleged larceny there were frequent jams in the flume, which caused the lumber and wood to be thrown out of the flume on the defendant's land, and in close proximity to the creek. The lumber alleged to have been stolen was piled up in the barn and house of the defendant, which were both situated near the road where the public and Dorsey's hands passed and repassed, and could have been easily seen by any one. Eight or ten witnesses testified that the defendant was a man of good character, and in fairly good circumstances. The defendant sometimes broke jams in the flume in order to protect his land from overflow of water caused by the dam, as well as for the benefit of the prosecuting witness Dorsey. The defendant was a man of something more than fifty years of age, and had never been indicted or charged with any criminal offense. His Honor charged the jury, among other things, as follows:

"It has been argued here that there must be a definition of larceny, which definition should include appropriating them to the use of the parties stealing them. That has no basis in the definition, because it is not the intention of appropriating to one's own use that makes a man guilty, but the fact that he deprives another of the possession of his goods, no matter whether it is his intention, it might be to destroy them or merely to aggravate and deprive the owner of the property, and necessarily to appropriate them to the use of the party having them." The defendant excepted.

"The taking must be felonious. Felonious, as the court understands it, is the doing of an unlawful act willfully. It becomes necessary that I give you the definition of willfully, because if the crime was committed, the act, in the first place, in this bill of indictment must be felonious. And the doing of that act, which, if committed, would be unlawful, must be done willfully, and the term willfully implies the doing of the act purposely and deliberately, in the violation of the law." The defendant excepted.

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Dillard & Hill, Sherrill & Harwood, and Frye & Frye for defendant.

ALLEN, J. It will be observed that his Honor charged the jury: (1) That the intent to appropriate to his own use is not an essential element in larceny; (2) that depriving another of the possession of goods is sufficient; (3) that feloniously is doing an unlawful act willfully, which is not in accord with the authorities in this State and elsewhere, and more fitly describes a criminal trespass, in which the act must be done unlawfully and willfully (*S. v. Whitaker*, 85 N. C., 568), than larceny.

Ruffin, C. J., says, in *S. v. Jesse,* 19 N. C., 297, feloniously "has no synonym," and "admits of no substitute," and *Battle, J.*, in *S. v. Sowls.* 61 N. C., 154, in defining robbery, which is larceny from the person by violence, says the taking "must be done *animo furandi,* with a felonious intent to appropriate the goods taken to the offender's own use. Roscoe's Cr. Ev., 895. Although a person may wrongfully take the goods, yet, unless he intended to assume the property in them, and to convert them to his own use, it will amount to a trespass only, and not to a felony. 1 Hale's P. C., 890."

In *S. v. Powell,* 103 N. C., 430, *Shepherd, J.*, reviews the authorities, and quotes from the leading text-books with approval as follows:

"It (the taking) must be done," says Foster, 124, "with a wicked, fraudulent intention, which is the 'ancient known definition of larceny: *Fraudulenta obstrectatio rei alienoe invito domino.*'

"*Lord Hale,* P. C., 508, says: 'As it is *cepit* and *asportavit,* so it must be *felonice* or *animo furandi;* otherwise, it is not felony, for it is the *mind* that makes the taking of another's goods to be a felony, or a bare trespass only; but because the intention and mind are secret, the intention must be judged by the circumstances of the fact.'

"'The felonious intent, or *animus furandi,* means an intent fraudulently to appropriate the goods. Whether the intent existed or not is entirely a question for the jury, which, as in all other cases of intent, they must all infer from the words or acts of the defendant or the nature of the transaction.' Archbold Crim. Practice and Pl., 2 vol., 6 ed., 366-4.

"In his Pleading and Evidence, 3 Am. Ed., 173, Archbold thus defines the felonious intent: 'But larceny, as far as respects the intent with which it is committed, . . . may, perhaps, correctly be defined thus: where a man knowingly takes and carries away the goods of another, without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use.'"

Again, as to the charge that it is sufficient if the intent exists to deprive the owner of the possession instead of the property itself, in *S. v. Ledford,* a new trial was ordered because of an instruction, "That to constitute larceny as to the taking, that all that was necessary was to prove that the defendant took the property with intent to remove it out of the possession of the owner," and in *S. v. Lyerly,* 169 N. C., 378, the following charge was approved as "supported by the precedents": "That if they should find from the evidence, beyond a reasonable doubt, that the defendant obtained possession of the $50 bill, under the circumstances testified to by the prosecuting witness, with 'an existing felonious intent permanently to deprive the prosecutor of his ownership in the money, and to convert it to his own use, and in pursuance of such intent, and in the execution of such design' did as testified to by the prosecuting witness, they should return a verdict of guilty of larceny, as charged."

(The language "did as testified to by the prosecuting witness" is a summary by the court, and was not used by the presiding judge.)

In 17 R. C. L., 5, one of the latest authorities, and reliable, defines larceny: "As the felonious taking by trespass and carrying away of the goods of another, without the consent of the latter, and with the felonious intent permanently to deprive the owner of his property and to convert it to his, the taker's own use," a definition following the decisions in our State, and which we approve with the interpretation that the intent to convert to one's own use is met by showing an intent to deprive the owner of his property permanently for the use of the taker, although he might have in mind to benefit another.

His Honor also charged the jury, after stating certain contentions of defendant, that, "If that satisfies you to your own satisfaction, it would be your duty to return a verdict of not guilty," a form of instruction disapproved in *S. v. Harrington,* 176 N. C., 716, because it "Was calculated to mislead the jury into the error that the guilt of the defendants turned upon whether the explanation was a satisfactory one; whereas, it should have been made to turn upon all the evidence, that of the State and the defendants, and the sole inquiry should have been whether the State had carried successfully its proper burden and satisfied the jury, beyond a reasonable doubt, of their guilt."

We have not overlooked the motion for judgment of nonsuit, but the record does not purport to give the entire evidence, and parts of the charge, stating the contentions of the State and defendant, to which there is no exception, show that much that is material has been omitted, and we cannot therefore pass on the motion.

We are of opinion that prejudicial error is shown in the instructions to the jury, and for this reason a new trial is ordered.

New trial.

STATE v. YEARWOOD AND TABOR.

(Filed 20 December, 1919.)

1. **Criminal Law— Burnings— Evidence — Nonsuit — Questions for Jury— Trials.**

Evidence in this case tending to show that one of the defendants owed the prosecuting witness money for hauling and delivering lumber, which he paid only in part; that he had deceived the witness as to the amount he owed, and being pressed for payment, suggested leaving the worst lumber, having it insured, setting fire thereto, and collecting the insurance money; that he thereafter actually had the lumber insured for himself; a fire occurred, his codefendant, in his employ, was seen near the place of the fire just before it occurred, acting in a suspicious manner, and that both were tracked from the scene of the fire by a bloodhound, etc., with the other evidence in the case, is *Held* sufficient, upon a motion as of nonsuit, for the determination of the jury, upon the guilt of both defendants of setting fire to and burning the lumber.

2. Criminal Law—Evidence—Bloodhounds.

Where there is evidence that the defendant, indicted for setting fire to and burning lumber, was seen at the place of the crime by a witness, and that he left the place in a suspicious manner, taking a devious route in the direction of his home, going around the ends of logs instead of jumping over them, etc., in corroboration and as a further circumstance tending to convict the defendant of the crime, testimony is competent that the witness put a bloodhound on tracks corresponding with those of the prisoner at the place of the burning, where he had been seen, and that the hound followed the devious route that the witness had taken until it had trailed the prisoner to the bed it was shown he had slept in the night before; and that the witness had many times tested the bloodhound in trailing human beings on other occasions, and had found it accurate.

3. Criminal Law—Alibi—Evidence—Circumstance to Show Guilt.

Where the mother of the prisoner had told the prosecuting witness, in his presence, that the prisoner had been in bed for a period embracing the time the offense had been committed for which he was being tried, and the prisoner had assented, it will be taken that she was endeavoring to set up an alibi for him, and it is competent to introduce evidence in contradiction as a circumstance tending to show his guilt.

4. Appeal and Error—Objections and Exceptions—Unanswered Questions.

The answer expected of a witness to a question excepted to must be made to appear, that the Supreme Court may pass upon its relevancy and materiality, or the exception will not be considered on appeal.

INDICTMENT, tried before *McElroy, J.*, and a jury, at March Term, 1919, of GRAHAM.

There were originally three counts in the bill of indictment: First, charging that the defendants set fire to and burned a certain building, the property of C. C. Mills; the second, that the defendant Yearwood burned the building, and that defendant Tabor aided and abetted him in it; and the third charge, willful injury to the property of C. C. Mills by setting fire to and burning certain sawed lumber. The defendants, at the close of the State's evidence, and again at the close of all the evidence, moved for judgment as of nonsuit against the State. The judge allowed the motion as to the first two counts, and refused it as to the last count. This refusal the defendants allege as error here.

The State's evidence tended to show that in 1916 the defendant Tabor bought from C. C. Mills the timber on Mills' land in Graham County, and Mills was to log it and deliver it at the mill for $7 per thousand feet. Mills logged and Tabor sawed four mill-yards of the timber. The sum of $4 per thousand was to be paid when the logs were yarded, and the balance to be paid when the timber was sold. Tabor fell behind with his payments, and Mills accused him of cheating in the measurements. They agreed to let one Boyd estimate the yard in question, and he found 191,000 feet on the yard, when Tabor had reported to Mills only 142,000. In the meantime, Tabor had sold the lumber to one Tatham, who had made payments to him on it. Tabor hauled out the first and second yards and sold them without paying Mills for them, and Mills told Tabor he was going to collect his money. Tabor proposed that he would pick out the best lumber, sell it, pay Tatham, then insure the balance, burn it up, get the insurance, and thus get his pay for poor stuff. Mills refused to have anything to do with the offer, and Tabor said: "It has been done, and it can be done again." Mills immediately went to Mr. Dillard, an attorney, and told him what Tabor had said, and, at the same time, started suit to collect his money, and had Tabor restrained from hauling the lumber off. That was in October, 1917. Tabor paid Mills $525, and agreed to haul out the balance of the lumber and pay Mills, but the lumber had to be carried nine miles over a rough mountain, and he hauled out only 40,000 feet and quit, and in the spring of 1918 Mills asked for the appointment of a receiver. A receiver was appointed, but Tabor again went to Mills and agreed to pay him, and the receiver did not qualify. Tabor did nothing about paying Mills, but on 1 May, 1918, he procured for himself $4,000 fire insurance on the lumber. In May notice was served on Tabor that on 3 June Mills would move at Robbinsville to have the judge appoint a permanent receiver, but on Saturday night, 1 June, both yards of the lumber, containing nearly a million feet, and separated by a ridge, were simultaneously fired and burned up. In the two yards there were about 150,000 feet of mill culls, two house patterns, and some wagon timber, owned by Mills, in which Tabor had no interest. Mills was in bed when his family discovered the fire, and he immediately went to the scene, but it was too late to save anything. He went to the homes of the neighbors and informed them to stay away from the yards. When he went to the home of the defendant, Swep Yearwood, who lived with his parents, Yearwood was in bed, and Mills saw him and talked to him. Swep Yearwood's mother, in his presence, claimed that Swep had not been out of bed for two days, and protested that Swep was innocent, although Mills had not accused Swep, or any one else, of burning the lumber. Mills then placed guards at the lumber yards to keep people from spoiling the tracks, and set out to get bloodhounds. On his way to Murphy he stopped at the home of Tabor, who lived across the mountain near Marble, waked him, told him of the fire, and tried to get him to help him get bloodhounds to trail the guilty party, but Tabor refused to do anything, and asked Mills to wait till the next day. Tabor had been at a lodge meeting at Marble that night, and had seen the light from the fire, and the first thing that occurred to him was that it was his lumber, but he made no investigation. Tabor promised to meet Mills at Marble the next morning, and Mills went on to Murphy and phoned to Asheville for bloodhounds. He went back to Marble and got breakfast, but Tabor did not meet him there. He went home, got money to pay for the dogs, and went back to Marble to meet the train, and on the top of the mountain he met Tabor going towards the lumber camps. He again tried to get Tabor to help him about the trailing, but Tabor refused, and went on.

On Saturday afternoon, about dusk, and not long before the fire was discovered, Garfield Rhodes, who worked for Mills, was in the woods near the Chestnut Gap, looking after one of Mills' oxen which had its horn torn off. While there he saw Swep Yearwood going towards home in a hurry from the direction of the lumber yards. Yearwood did not follow the top of the ridge at the gap, but "circled off to one side" for some distance and went back to the top, and on toward home.

The bloodhounds were taken to the upper yard late Sunday afternoon, and struck a trail where a man's track was very plain, a No. 7 or 8 shoe. The dog trailed across the hill to the other burned yard, circled around there a while, picked up the trail, followed it across Chestnut Gap, where Rhodes had seen Yearwood, turned off from the top of the ridge just where Yearwood had gone. Tracks were visible where the dog trailed, and he went on down the ridge, around Yearwood's fence, through the gap, across the field, into Yearwood's house, passed the other beds, went up to the bed where Swep had slept the night before, jumped upon it with his forefeet, sniffed, smelled the pillow and quit trailing. There were several large logs in the trail coming down the ridge, and Swep, who had the mumps, had not climbed over any of them, but had gone around the ends, and when he had come to the fence he did not climb over it, but went around to the gap. The dog pursued the same course. Swep was not at home, but was up at the camp. Tabor had left the crowd as soon as the dog struck a trail towards Yearwood's, and the next time he was seen he was also at the camp where Swep was. Swep had been at work for Tabor for a long time, and was then in his employ. Before the dogs came that day, Pat Yearwood said, in Swep Yearwood's presence, that all he hated about the dogs coming was that they would trail them to some of their houses. After the dogs had trailed to Yearwood's house and the people had started back across the mountain, Tabor took Mills aside and told him he had $4,000 insurance, of which 80 per cent was collectible, and that if he would hush and drop the matter where it was he would give him one-half of it.

A warrant was issued for Yearwood, but Tabor was not indicted till the grand jury met. Tabor kept Yearwood in his employ, furnished him money to go to the preliminary hearing before a justice at Robbinsville, went with him to the trial, and also had counsel there to represent himself. Tabor kept Yearwood in his employ, and the two of them employed the same counsel for their defense, and Tabor stayed much with the Yearwoods, and they with him. Tabor received from Tatham advancements of $8 per thousand on the lumber, and he had paid Mills $4 per thousand, and had used the other $4 to pay for sawing it. He had put no money into it himself, and whatever he could have gotten out of the insurance company would have been clear money. The above testimony relates to the motion for a nonsuit.

Other exceptions relate to the admission of evidence, as to the acts of the bloodhound which was put upon the trail of the defendant Yearwood. The defendant contended that the State failed to lay a proper foundation for such evidence, and that the dog had failed to identify Yearwood as the criminal. The witness Dillingham testified:

"I live in Asheville and am a plain-clothes policeman. Some dogs are kept in Asheville by Chief of Police John Lyrle. I brought the dog, Joe, out here. He has been in Asheville for about two years or a little longer, and I have been handling him myself a little over twelve months. He is an English bloodhound. I have used him on about ninety cases since I have handled him. He will trail nothing but a human being. If I set him on the track of a human being he will not change from one track to another, at least he never has since I have been handling him. I have run eighty-six or eighty-seven cases with him."

The owner of the property destroyed at once put guards about the burned yards to prevent outsiders from confusing the tracks of the criminal. The fire had "run" over the fallen leaves about the yards some twenty or thirty steps. When Dillingham came with his dog, he found a well-defined track in a damp place near the margin of the burnt place. Ht put his dog on that and he pursued the trail to the other burned mill, took it up there again, and carried it to the house of O. P. Yearwood, the father of the defendant Swep. The track at the starting point, where it was fully defined, was measured. The last track measured along the trail was in Yearwood's field, in about a hundred and fifty yards from his house. This agreed with the first measurement. Garfield Rhodes, a witness for the State, had observed the defendant, Swep Yearwood, at Chestnut Gap the afternoon immediately preceding the fire. "When I first saw him," said he, "he was coming from the lumber, trotting or walking. I don't know whether he saw me or not. This was between sundown and dark. When I saw him he turned to the left." The dog followed along this trail and turned off where Swep turned off. Swep was suffering from the mumps that night, and Mills stated, "During the tracking the dog trailed by logs across the trail. There was something like three or four of them, and the dog went around the ends of them." The following is Mills' account of what the dog did when they arrived at Yearwood's house:

"When we got to the house Mr. Yearwood and Mrs. Yearwood were sitting on the porch. We went up to them and he went along smelling the floor into the house, and scented these beds as he came along until he came to the third bed, and scented good at that, and reared up and smelled the cover of the bed and ran his nose down the pillow as many as three times, and made a sniffling noise with his nose. This was the bed I saw Swep in the night before."

Dillingham stated: "At the house Mr. Mills said he was satisfied, and I went down to the branch and got some water, and had no more dog work. We loaded the dog back in the wagon and carried him across the mountain. He would not have paid any attention to the man we had been trailing after we loaded him into the wagon."

Mills and Birchfield testified to a conversation with Swep a day or two after the burning, in which Swep said: "I understand I burned your lumber"; and further stated, "I had a hard time burning those two yards and running around the hillside and going into the house." Birchfield testified in the same conversation, and immediately on making this statement, that Swep said "he was as clear as me or Mills."

There are some exceptions to evidence to be noticed hereafter.

Defendants were convicted, and appealed from the judgment.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

M. W. Bell and R. L. Phillips for defendants.

WALKER, J., after stating the relevant facts as above: The evidence in this case was certainly sufficient to be considered by the jury upon the issue as to defendant's guilt, and the motion for a nonsuit was properly disallowed. The question as to the competency of testimony about the trailing of a person suspected of guilt by bloodhounds has been thoroughly well settled by this Court, and we have held that, under certain conditions, such evidence is admissible. The dog which trailed this defendant proved his own reliability. The subject is fully treated in *S. v. McIver,* 176 N. C., 718, and cases therein cited. A case which comes very near to a perfect likeness of this one is *Richardson v. State,* 145 Ala., 46, where it was held that, under proper conditions, it is permissible for the purpose of connecting a defendant with a crime, to admit evidence, along with the other circumstances, that dogs trained to track human beings were put on the trail at the scene of the crime, where circumstances or evidence tend to show the defendant had been, and that after taking the trail they went thence to a point where defendant is shown to have been after the commission of the act. Where such evidence is proposed to be introduced, it would, of course, be proper to allow a witness, familiar with the dogs and accustomed to handling them, to testify that they are skilled in the trailing or tracking of men, and within what time, after the making of tracks, the dogs would take up and follow the trail. The court committed no error in allowing the witness Townsend to testify along these lines, citing *Hodge v. State,* 98 Ala., 10; *Simpson v. State,* 111 Ala., 6; *Little v. State* (Ala.), a. 432. *Hodge v. State, supra,* is also much like the case at bar. *Justice McClellan* there said: "We are of the opinion that the fact that the dog, trained to track men, as shown in the testimony, was put on the tracks at the scene of the homicide, and, 'taking the trail,' so to speak, went thence to defendant's house, where he, the defendant, is shown to have been that night after the killing, was competent to go to the jury for consideration by them, in connection with all the other evidence, as a circumstance tending to connect the defendant with the crime; and, of consequence, that the court committed no error in refusing to exclude it." In *Parker v. State,* 108 Am. St. Rep., 1021, it was held that if a human track, assumed to be that of the person accused of crime, and which the circumstances in evidence tend to show was his track, was pointed out to the bloodhound trained in trailing human tracks, and such dog trailed the track from where it was pointed out to him to the residence of the accused, some mile and one-half away, and the course of his pursuit of such track was followed by witnesses, who testified that the dogs followed this same track, which they described, evidence of these facts is admissible as showing a circumstance connecting the accused with the crime. On the trailing of one accused of murder, whose tracks have been followed by a bloodhound, a witness is competent to state his knowledge of, and experience with, such dog as being an animal trained and used for the purpose of running down human beings. A case of prominence in this branch of the law, and frequently cited, is *Pedigo v. Com.,* 103 Ky., 41 (44 S. W., 143), where it was held that testimony as to trailing by a bloodhound is admissible, where it is established by the testimony of some person who has personal knowledge of the fact that the dog in question has acuteness of scent and power of discrimination, and has been trained or tested in the tracking of human beings, and it appears that the dog so trained and tested was laid on the trail, whether visible or not, at a point where the circumstances tend clearly to show that the guilty party has been, or upon a track which such circumstances indicate to have been made by him. The same Court held, in *Denham v. Com.,* 119 Ky., 508, that in a prosecution for crime, evidence of the trailing of defendant by bloodhounds, which were shown to have been of good breeding, and to have been carefully trained in tracking men, and which had tracked and aided in the capture of many criminals, was admissible, although the pedigree of the dogs were not asked about or stated with particularity.

The Court said, in *Davis v. State,* 46 Fla., pp. 137-140: "The adjudged cases on this point are few, but uniform in admitting such evidence under proper conditions. But in order that such testimony be admissible, there must be preliminary proof of such character as to show that reliance may reasonably be placed upon the accuracy of the trailing attempted to be proved. There should first be testimony from some person who has personal knowledge of the fact that the dog used has an acuteness of scent and power of discrimination, which have been tested in the tracking of human beings. The intelligence, training, and purity of breed are all proper matters for consideration and determining the admissibility of such evidence, as is also the behavior of the dog in following the track pointed out," citing authorities.

We have referred to the above authorities specially, because their facts are so analogous to those of the case in hand. But the principle is so well settled in this State that it is much too late now to question it. The evidence here fully complies with the rule of admissibility, as stated by us. There is evidence that the dog which was set on the trail was an English bloodhound of established reputation, and had been trained and handled by its owner in a large number of cases where human beings had been trailed. The conduct of the dog was somewhat remarkable, and indicated that he was competent and well fitted for the pursuit in which he was employed. The defendant, Swep Yearwood, had evidently been at one of the yards on the evening of the fire, and was seen by others on his way back to his home. He was not traveling the ordinary and usual route, near the gap, but deviated therefrom, and when he came to logs he did not step over them, but went around the ends, and the dog pursued the identical course when trailing him, showing that his scent was keen and discriminating. He then followed his tracks to his home, and to that part of the bed in which he had slept the night before, and showed by his action and conduct that he had found this as his last resting place. The defendant was not pursued further because the dog's owner, and trainer, deemed it unnecessary. We do not say that this testimony was at all conclusive, but it disclosed facts and circumstances sufficient for the consideration of the jury in connection with the other evidence in the case, and as corroborative thereof. *S. v. Moore,* 129 N. C., 494, and *S. v. Norman,* 153 N. C., 592, relied on by defendant, are materially different from the decisions cited by us, and from this case, and do not apply.

The motion to nonsuit was properly overruled as to both defendants, because there was evidence for the jury upon the question of guilt. The circumstances connecting Tabor with the commission of the offense were sufficiently strong for submission to the jury.

We have reviewed carefully the questions of evidence, and find no error in the judge's rulings in regard to it. What was said by Yearwood's mother and sister was but a part of a conversation between them, C. C. Mills, and Swep Yearwood. The latter must have understood the significance of it, and that it was calculated and intended to produce the impression upon Mills that Swep was innocent because he had been confined to his bed for two days and nights, and therefore could not have been at the wood, or lumber, yards. Mills asked the defendant if he had been in bed, and he replied that he had. He was seen late that afternoon coming from the lumber yards and going to his father's house. This apparent deception on his part was relevant to the issue, because it was a circumstance tending to show guilt. He was pretending to be innocent by impliedly asserting an alibi, when there was evidence that there was no alibi, as he had actually been seen away from his home and returning to it that afternoon. We considered a similar question in *S. v. James Lewis,* 177 N. C., 555, and it was there held that where a prisoner and his witnesses have testified, for the purpose of proving an alibi, that he was sick in bed for a period of time extending over two weeks, including the day on which the rape was committed, for which he was being tried, it is competent, in order to contradict these statements, for the State to show that during that time he was several times seen apparently well and going about at other places. The defendant in this case can hardly be heard to deny that his conduct on this occasion was a virtual representation that he had been sick and in bed during the period covering the afternoon on which the burning of the lumber occurred.

Unanswered questions are not legitimate subjects of exceptions, unless it appears what was expected to be proved, or, in other words, what the answer would have been if it had been admitted by the court. It would be useless to send a case back for a new trial for such alleged errors as the witness, when again questioned, may say that he knows nothing about the matter, and if so, our labor will have been in vain, and worse it would be, for we would have uselessly prolonged litigation. This kind of exception has frequently been disallowed. It is said in *Gibson v. Terry,* 176 N. C., 533: "There is another reason why the exception cannot be sustained. While the question indicates what the defendant was endeavoring to prove, it does not appear in the case on appeal what the witness would have testified to. He might have answered 'Yes' or 'No.' In *Knight v. Killbrew,* 86 N. C., 402, the Court says: 'It is a settled rule that error cannot be assigned in the ruling out of evidence unless it is distinctly shown what the evidence was in order that its relevancy may appear, and that a prejudice has arisen from its rejection.'" *Justice Allen* cites *Knight v. Killbrew, supra,* and approves the quotation therefrom in *Stout v. Turnpike Co.,* 157 N. C., 367.

There are several other exceptions to evidence, but it is so apparent they were not well taken we will not discuss them, as it would protract the opinion beyond its proper limits without any corresponding benefit.

We have carefully scanned the record, and no error is found.

No error.

STATE v. FRANK PALMER.

(Filed 20 December, 1919.)

Criminal Law—Evidence—Accomplice.

One charged with the commission of a crime may be convicted upon the direct testimony of his accomplice therein if fully believed by the jury to be true.

INDICTMENT for burning an outhouse and other property belonging to George Palmer, tried before *McElroy, J.*, at February Term, 1919, of HAYWOOD.

Appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John M. Queen, G. S. Ferguson, G. S. Ferguson, Jr., and J. Bat Smathers for defendant.

PER CURIAM. The defendant, Frank Palmer, was charged with the burning of a certain outhouse, hay and corn, the property of George Palmer. Will Palmer and Mrs. J. F. Palmer were indicted with him.

Will Palmer submitted to a verdict of guilty to an attempt to burn, and Mrs. Palmer was acquitted.

There are nine exceptions in the record; seven of them are directed to the exclusion or admission of testimony; the other two are directed to alleged errors in the charge. We have given careful examination to each one and find them to be without merit, and think that they do not require discussion.

The State's evidence against Frank Palmer was amply sufficient, if believed by the jury, to justify conviction. Will Palmer testified directly to the guilt of himself and Frank Palmer. It is true that Will Palmer is an accomplice, but the evidence of an accomplice, if fully believed by the jury, is sufficient to sustain conviction. *S. v. Haney*, 19 N. C., 390. In this case, however, the accomplice, as corroborated by the testimony of his mother, as well as by the actions of the bloodhounds put upon the trail of the defendant. The testimony of Will Palmer is fully set out in the record, and is very clear and circumstantial. The motion for a new trial on the ground of newly discovered evidence must be denied.

No error.

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ABANDONMENT. See Contracts, 7.

ABATEMENT. See Judgments, 11.

ABDUCTION. See Criminal Law, 4.

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ACCIDENTS. See Insurance, Life, 2.

ACCIDENTAL KILLING. See Homicide, 12.

ACCOMPLICE. See Homicide, 17, 20; Criminal Law, 22.

ACCOUNTING. See Mortgages, 16.

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ACTIONS. See Attachment, 1; Motions, 1; Executors and Administrators, 1; Partnership, 2; Pleadings, 1, 10; Deeds and Conveyances, 22; Statutes, 3; Banks and Banking, 1; Clerks of Court, 1; Taxation, 7, 8, 10; Judgments, 3; Limitation of Actions, 4; Husband and Wife, 7; Parties, 4; Municipal Corporations, 2; Divorce, 1; Wills, 23; Libel and Slander, 1.

1. *Actions—Counterclaims—Subject-matter.*—In an action involving title to lands, the defendant may not set up, as a counterclaim, alleged acts of trespass on other of his lands, the subject-matter of the counterclaim being different from and not connected with the cause being tried. *Hutton v. Horton*, 549.

2. *Actions—Estates—Reversion—Possession—Tenant by the Courtesy—Life Tenant.*—After the death, intestate, of the mother, the owner of lands, her children hold a reversionary interest therein during the life of their father, and the father, being the tenant by the courtesy, and entitled to the possession, they may not presently maintain an action asserting their ownership and right to possession before his death. *Loven v. Roper*, 581.

3. *Actions—Estates—Reversion—Possession—Cloud on Title—Parties—Life Tenant—Equity.*—The holders of a reversionary interest in lands may presently maintain their action against one unlawfully in possession, claiming the title, to remove such adverse claim as a cloud upon their title, under our statute, Pell's Revisal, sec. 1585; and the life tenant is not a necessary party to the action, but the trial judge, in his discretion, may order him to be joined therein as a party plaintiff or defendant. *Ibid.*

ADJOINING OWNERS. See Deeds and Conveyances, 2.

ADMISSIONS. See Limitation of Actions, 2; Contracts, 6.

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APPEAL AND ERROR. See Courts, 3, 7; Injunctions, 1; Husband and Wife, 6; Trusts, 2; Negligence, 3; Evidence, 3, 9, 12, 17, 32, 33; Clerks of Court, 1; Descent and Distribution, 1; Parties, 1; Damages, 6; Trials, 1, 2; Deeds and Conveyances, 14; Pleadings, 6; Vendor and Purchaser, 7; Instructions, 4, 5, 6, 7, 9, 13; Carriers of Goods, 17; Municipal Corporations, 8; Sheriffs, 1; Spirituous Liquor, 1; Homicide, 11, 13; Larceny, 2; Removal of Causes, 6; Criminal Law, 15, 16, 17; Witnesses, 1.

1. *Appeal and Error—Issues.*—It is not error for the court to submit issues tendered by a party to the action if the issues submitted have presented every phase of the controversy. *Daniels v. Distributing Co.*, 15.

2. *Appeal and Error—Issues—Evidence—Harmless Error.*—Evidence bearing upon one issue in the case on appeal, when the case is conclusive upon the answer to another one, is immaterial, and its admission, if improper, is not reversible error. *Clements v. Power Co.*, 53.

3. *Appeal and Error—Objections and Exceptions—Objectionable as a Whole.*—Where evidence, admitted on the trial of an action, is excepted to and the whole is objectionable as hearsay, the rule that the party is required to single out and except to such evidence only as is objectionable, where some thereof is competent, cannot apply. *Bryant v. Bryant*, 77.

4. *Appeal and Error—Findings—Remanding Case—Gasoline—Distributing Plants—Municipal Corporations—Cities and Towns—Ordinances—Rehearings.*—Upon suit to compel the proper officer of an incorporated town to issue a permit to the plaintiff to erect an oil or gasoline distributing plant for the handling of large quantities thereof at a certain place therein, the defendant denied his legal authority, or if otherwise, that the issuance of the permit was a matter of his discretion; and further, that the erection of the plant was in violation of certain ordinances of the town: *Held*, error for the lower court to issue the *mandamus* upon his opinion that the defendant was not

APPEAL AND ERROR—*Continued.*

vested with discretionary authority, and decline to pass upon the validity of the ordinances; and the case is remanded for him to make further findings of facts with reference to the ordinances, and whether the issuance of the permit will violate them or any of them. *Refining Co. v. McKernan*, 82.

5. *Appeal and Error—Transcript—Docket—Dismiss—Motions—Rules of Court.*—The certificate of the clerk of the Superior Court is necessary to complete appellee's motion to dismiss (Rule 17) for appellant's failure to file his transcript on appeal within seven days before entering upon the call of the docket to which it belongs (Rule 5); and where the appellee has failed to comply with Rule 17 until after the appellant has docketed his transcript in compliance with Rule 5, his motion will be denied and the hearing continued under Rule 5. *Mitchell v. Melton*, 87.

6. *Appeal and Error—Fragmentary Appeal—Mortgages—Sales—Interpleader—Stake-holder—Orders—Inconsistent Positions.*—Where the mortgagee has a surplus fund in his hands for distribution among the devisees of the deceased mortgagor, among whom is a *bona fide* dispute as to their distributive share, and the mortgagor has brought suit to protect himself in paying over the amount in his hands, his appeal from an order of court directing him either to pay the same into court or to give bond for the protection of the claimants is a fragmentary one and improvidently taken; and further, his position in objecting to the order is antagonistic to the basic facts required to sustain his suit, which he will not be allowed to question. *Lipsitz v. Smith*, 98.

7. *Appeal and Error—Assignments of Error—Error Specified.*—Assignments of error will not be considered on appeal when not properly taken by the appellant according to the rules of the Supreme Court concerning them. *Moore v. Trust Co.*, 118.

8. *Appeal and Error—Objections and Exceptions—Deeds and Conveyances—Sufficiency.*—Objection to the introduction of a deed in a chain of title, on the ground that the preliminary fact of the destruction of the registry in which it had been recorded had not been shown, must be taken specifically to be available by exception on appeal, and this objection will not be considered when the only ground of objection stated in the record is to the sufficiency of the deed to show the authority of the grantor to make it. The objector is confined to the ground he stated below. *Baggett v. Lanier*, 129.

9. *Appeal and Error—Presumptions—Evidence—Error—Burden of Proof.* The rulings of the lower court in admitting evidence objected to on the trial will be presumed to be correct, on appeal, in the absence of anything of record showing the contrary, as the burden is on the appellant to show error on appeal. *Ibid.*

10. *Appeal and Error—Courts—Verdict Set Aside.*—Where a trial has proceeded upon the question of estoppel which has not been pleaded, as required, and the trial judge has set the verdict aside as a matter of law, without assigning his reason, but with permission to the party to plead the estoppel, his action will be construed, on appeal, as based upon his own error, and his setting aside the verdict will not be held as erroneous. *Upton v. Ferebee*, 194.

APPEAL AND ERROR—*Continued.*

11. *Appeal and Error—Objections and Exceptions—Competent in Part—Requests for Instructions.*—A general objection to evidence which is competent as corroborative will not be sustained, the remedy being for the appellant to ask that it be restricted to that purpose. *Singleton v. Roebuck*, 201.

12. *Appeal and Error—Exceptions—Objections and Exceptions.*—Exceptions to instructions given by the court to the jury will not be sustained if they cover, in part, instructions that were properly given, for the defendant should separate the good from the bad and except only to the latter. *Ibid.*

13. *Appeal and Error—Issues—Issue Tendered—New Trials—Verdict Set Aside—Interdependent Issues.*—Where the trial judge has erroneously refused to submit an issue tendered by a party to the action, and this and the issues submitted and found against him are somewhat interdependent, and injustice may be done him by granting a new trial only under the issue refused, the Supreme Court may set aside the answers to the issues submitted, and direct a new trial under all of the issues. *Dixon v. Green*, 206.

14. *Appeal and Error—Exemptions—Homestead—Findings.*—Where for the first time, on appeal, the question is raised as to the residence of a claimant for his personal property exemption, and it appears that it is from a stock of goods in the county wherein he had been located and doing business, and his right had been erroneously denied on other grounds by the Superior Court, it will not be denied by the Supreme Court on the ground stated, in the absence of definite and specific finding as to residence. *Befarrah v. Spell*, 232.

15. *Appeal and Error—Evidence—Instructions—Issues—Prejudicial Error—Harmless Error—Statutes.*—The result of the trial of a cause will not be disturbed unless it is reasonably made to appear that prejudicial error has been committed to the injury of the appellant, and where objection is made that the charge of the court did not fully or sufficiently state and apply the law to the evidence as required by Rev., sec. 535, and the issue was one largely of fact with the pertinent testimony very restricted in its nature, and the charge as a whole was correct, with the burden of proof properly placed, a new trial, in the absence of prejudice to the appellant, or where the jury could not have been misled, will not be awarded. *Powell v. R. R.*, 243.

16. *Appeal and Error—Instructions—Special Requests—Burden of Proof.*—Where the issue as to whether the defendant acted as a common carrier in delivering plaintiff's lumber to a carrier by water is determinative of the action when answered in defendant's favor, and it has been so answered, the refusal of requested instructions upon another issue, directed to the burden of proof, becomes immaterial on appeal. *Bryant v. Stone*, 292.

17. *Appeal and Error—Evidence—Judgments—Objections and Exceptions.*—Where the controversy depends upon the effect of the defendant's negligently tying a lighter to a dock, exception by plaintiff to the signing of the judgment is without merit, there being testimony that it was the plaintiff's duty to furnish a watchman at night, which would have tended to avoid the injury. *Ibid.*

APPEAL AND ERROR—*Continued.*

18. *Appeal and Error—"Moot Questions"—Appeal Dismissed—Calls—Cities and Towns—Primaries.*—Where the trial court has restrained a city board of elections from calling a primary election under the act of 1919, and the election has been held under the prior law, in force at the time, by order of the judge: *Held*, the Supreme Court may not then order another primary, and the question presented becoming a "moot" one, the appeal will be dismissed. *Sasser v. Harris*, 322.

19. *Appeal and Error—Objections and Exceptions—Assignments of Error—Judgments—Rules of Court.*—Exceptions to a judgment, that it was not justified by the facts found or admitted, or to the court's jurisdiction, fall without Supreme Court Rule 27, requiring errors relied on must be assigned in the record, and Rule 19 (2) as to grouping and numbering of exceptions, under penalty of dismissal, for in such instances the appeal itself is an exception. *Owens v. Hines*, 325.

20. *Appeal and Error—Evidence—Questions and Answers—Objections and Exceptions.*—Upon the rejection of a question asked a witness, it must appear on appeal the testimony sought to be elicited by the answer, or the exception will not be considered. *Brown v. Blue*, 334.

21. *Appeal and Error—Instructions—Objections and Exceptions—Presumptions.*—It will be assumed on appeal that the evidence on the trial was fairly submitted to the jury when there is no exception to the charge of the judge. *Ibid.*

22. *Appeal and Error—Findings—Pleadings.*—An allegation of the complaint, denied in the answer, is valueless on appeal in the absence of a finding thereon by the trial judge who, under an agreement of the parties, was to find the facts in controversy. *Comrs. v. Raeford*, 338.

23. *Appeal and Error—Evidence—Municipal Corporations—Bridges—Cities and Towns—Harmless Error.*—Where the negligence of the city caused the death of the plaintiff's intestate by permitting the guards to its bridge to remain insufficient for his protection, error, if any, in receiving testimony of a conversation of a witness with the engineer when constructing the bridge, as to danger of leaving it unguarded in that way, is harmless. *Comer v. Winston-Salem*, 383.

24. *Appeal and Error—Evidence—Pleadings—Harmless Error.*—Defendant's exceptions to the introduction in evidence of an incomplete part of his answer to an allegation in the complaint, if erroneous, is harmless, or of insufficient importance to justify a new trial, when the witnesses have testified to the same state of facts, not controverted, and the charge of the court to the jury is a correct one. *Bank v. Park*, 388.

25. *Appeal and Error—Objections and Exceptions—Exceptions Correct in Part.*—Exceptions taken to long extracts from the charge, which are correct in part, will not be considered on appeal. *Ibid.*

26. *Appeal and Error—Objections and Exceptions—Contentions.*—Exceptions to the judge's statement of the contentions of the parties must be taken at the time it was made, in order to afford him an opportunity to correct them, or they will not be considered on appeal. *Ibid.*

27. *Appeal and Error—Motions—Retaxing Costs—Former Judgment—Error in Judgment.*—Where the Superior Court has ordered lands to be

APPEAL AND ERROR—*Continued.*

sold by its commissioner, and that he, out of the proceeds, pay off a lien thereon, costs, etc., and pay the balance to the plaintiff, from which he gave notice of appeal, which was not perfected, and consequently dismissed in the Supreme Court under Rule 17, and at a subsequent term of the Superior Court the plaintiff moved to retax the costs, which was denied and appeal taken from its refusal: *Held*, the motion, called by the plaintiff one to retax costs, was in fact one to correct an alleged error in the former judgment in not taxing them against the defendant, and the plaintiff is concluded by the former judgment, not having excepted and appealed therefrom, and alleging no errors or mistakes in any particular item of cost. *Johnson v. Brothers*, 392.

28. *Appeal and Error—Contentions—Instructions—Objections and Exceptions.*—To errors claimed in the statement of the contentions by the trial judge, his attention must have been called at the time so that he could have had opportunity for making the proper amendments, or exceptions thereto will not be considered on appeal. *Storcy v. Stokes*, 409.

29. *Appeal and Error—Judgments—Correction—Statutes—Pleadings—Process—Court's Discretion.*—The provisions of Rev., 507, among other things, allowing the judge or court, before or after judgment, in furtherance of justice, and on such terms as may be proper, to amend any pleadings, process of proceedings, by correcting a mistake in the name of a party, etc., is within the discretion of the Superior Court judge, and not reviewable on appeal in the absence of palpable abuse. *Gordon v. Gas Co.*, 435.

30. *Appeal and Error—Opinion of Court—Issues—Damages.*—*Held*, the issue suggested by the opinion of court in this case, granting a new trial, might be extended to read, "To what amount is the plaintiff's premises increased by such permanent improvement?" *Pritchard v. Williams*, 444.

31. *Appeal and Error—Anticipating Error.*—Upon granting a new trial on appeal, the Supreme Court will not ordinarily pass upon matters not presented therein, in anticipation of the law as the Superior Court judge may thereafter rule it to be. *Ibid.*

32. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—For exceptions based upon an alleged erroneous statement of a party's contention by the trial judge to the jury, to be considered on appeal, it must appear that the judge was requested to correct his statement at the time, and failed or refused to do so. *Winchester v. Winchester*, 483.

33. *Appeal and Error—Exceptions Abandoned—Briefs.*—An exception not referred in the brief is considered as abandoned on appeal. Rule 34. *Allen v. Reidsville*, 513.

34. *Appeal and Error—Injunctions—Fraud—Findings.*—Where matters of fraud alleged as the basis of an application for an injunction are denied by the answer, and there is a finding by the judge, acquiesced in by the plaintiff, that there was no fraud, this question will not be considered on appeal. *Ibid.*

APPEAL AND ERROR—*Continued.*

35. *Appeal and Error—Objections and Exceptions—Findings of Fact—Evidence.*—Findings of fact by the judge, made with the consent of the parties, have the force and effect of a verdict, and are not reviewable on appeal except for the want of sufficient legal evidence to support them. *Mfg. Co. v. Lumber Co.*, 571.

35½. *Appeal and Error—Signing Judgment—Formal Exceptions.*—Formal exceptions to the act of the judge in signing the judgment appealed from present no questions of law for review on appeal. *Ibid.*

36. *Appeal and Error—Objections and Exceptions—Unanswered Questions.* An exception to a question asked a witness will not be considered on appeal when the expected answer is not made to appear, or its materiality shown. *Nance v. King*, 575.

37. *Appeal and Error—Rules of Court—Motions—Dismiss Appeal—Certificate—Transcripts—Clerks of Court.*—The clerk of the Superior Court, upon payment of the costs of the certificate, is without authority to refuse to sign the appellee's certificate, under Rule 17, to docket and dismiss the appeal in the Supreme Court for the appellant's failure to docket his appeal under the rule, and his refusal to do so, based upon the ground that appellant had paid him on account for making out the transcript, is an attempt to pass upon the rights of the parties on questions reserved for the Supreme Court: it being required of the appellant in such cases, either to apply for a *certiorari*, or answer appellee's motion and show cause why his appeal should not be dismissed. *Johnson v. Covington*, 658.

38. *Appeal and Error—Parties—Statutes.*—An appeal from an order of court making new parties is premature, the remedy of such being to have themselves exempt from paying cost in the final judgment in which the ultimate rights are to be determined. Rev., 563. *Joyner v. Fiber, Co.*, 634.

39. *Appeal and Error—Pleadings—Demurrer—Judgments.*—An appeal will presently lie from the overruling of a *bona fide* demurrer, and an entry of judgment by default for the want of an answer, pending the appeal, is erroneous. *Ibid.*

40. *Appeal and Error—Instructions—Correct in Part.*—Exceptions to the judge's charge will not be sustained on appeal when it includes a portion thereof that is correct. *Buchanan v. Furnace Co.*, 643.

41. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—An erroneous statement of the appellant's contentions in the instructions of the court to the jury must be called to the attention of the judge, at the time, so as to afford him an opportunity to correct it, and if this is not done it will not be considered on appeal upon an exception thereafter taken. *Ibid.*

42. *Appeal and Error—Instructions—Special Requests—Objections and Exceptions.*—Exceptions that the instructions of the court to the jury were not sufficiently full and explicit will not be considered on appeal. If the appellant desired any particular phase of the case to be presented to the jury, he should have requested a special instruction presenting it. *Ibid.*

APPEAL AND ERROR—*Continued.*

43. *Appeal and Error—Instructions—Indefiniteness.*—An instruction will not be held as error, for indefiniteness, when it appears, in connection with the charge and the evidence, that the jury must have fully understood it. *Ibid.*

44. *Appeal and Error—Instructions—Presumptions—Evidence.*—Where the instructions of the court are not set out in the record on appeal to the Supreme Court, it will be presumed that they were correctly given, in explanation of the relevancy and competency of the evidence excepted to, and as to the circumstances under which the jury could consider and apply it and to what extent it could be so considered and applied. *S. v. Stancill*, 683.

45. *Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.*—Objection to the admissibility of evidence should be taken before the witness has answered the question for the exception thereto to be available on appeal, unless the objection, which comes too late, is allowed by the judge in the exercise of his discretion. *Ibid.*

46. *Appeal and Error—Prejudice—Harmless Error—New Trials.*—Error must be prejudicial to the appellant for reversible error to be held on appeal. *Ibid.*

47. *Appeal and Error—Courts—Continuance of Case—Discretion—Abuse.*—The continuance of a case, on motion, is within the sound discretion of the trial judge, and is not subject to review, in the absence of abuse, which is not shown by the fact that he tried the case of a defendant the following week of the same term at which another had been convicted of participating in the same criminal offense. *S. v. Baldwin*, 688.

48. *Appeal and Error—Instructions—Evidence—Corrections—Consent of Appellant—Harmless Error.*—Where, upon the trial of an action, the judge announced that he will grant a new trial for an error he considered that he had committed in admitting evidence, and the defendant insisted that the trial continue, and the judge instructed the jury to disregard such evidence: *Held*, the defendant has no ground to complain that this course was accordingly pursued. *S. v. Bryant*, 702.

49. *Appeal and Error—Objections and Exceptions—Evidence—Restrictions—Rules Supreme Court.*—Exceptions to evidence admitted generally for all purposes, on the ground that it should have been restricted, or that it was incompetent in part, should be based upon the refusal of the trial judge to a request thereto made at the time of its admission, or it will not be considered on appeal. Supreme Court Rule 27. *S. v. Phillips*, 713.

50. *Appeal and Error—Homicide—Murder—Instructions—Typographical Omissions—Records.*—Where, upon the trial of an action for a homicide, the question of error devolves upon whether the several prisoners, or some of them, were guilty of murder in the first or in the second degree, an exception to a part of the charge, "if you find any of the defendants guilty of murder in the second degree, because only one defendant could be guilty of murder in the second degree," will not be sustained, when construing it with the balance of the same para-

APPEAL AND ERROR—*Continued.*

graph, it will appear that, through typographical error, there was an omission of words that only would give the instruction a meaning, and when thus given would render the charge a correct one, and that the jury must have so understood it. *S. v. Cain*, 724.

51. *Appeal and Error—Homicide—Murder—Objections and Exceptions—Amendments.*—On appeal from a conviction of murder in the first degree, *Semble*, exceptions to the charge omitted by counsel's oversight may be supplied on a *certiorari* from the Supreme Court, but they were not allowed in this case because of no merit in the errors alleged. *Ibid.*

52. *Appeal and Error—Objections and Exceptions—Instructions.*—An exception to an instruction as to one of several defendants having formed a common design to commit a homicide with the others, is immaterial as to him on appeal, when it appears that the one designated was acquitted at the trial. *Ibid.*

53. *Appeal and Error—Harmless Error—Criminal Law—Secret Assault—Evidence.*—An officer unsuccessfully attempted to stop an automobile, in which the defendants were carrying spirituous liquors for unlawful purpose, by firing at the tires, and later the same night the officer was injured while attempting to make the arrest at another place by a secret assault of the defendant upon him. *Held*, admission of testimony of another officer, as to the firing on the first occasion, who was present at the time, if not strictly relevant, was harmless error. *S. v. Bridges*, 733.

54. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—Objections to a statement by the judge of the appellant's contention as being incorrect, should be made at the time, or an exception thereto will not be considered on appeal. In this case it is held that the statement, "he stated on the stand he was going for liquor," is substantially the same as "I thought we were going after liquor." *S. v. Coleman*, 757.

55. *Appeal and Error—Objections and Exceptions—Criminal Law—Legal Principles.*—Exceptions that the judge should have instructed the jury upon the defendant's contentions on trial for violating the prohibition law, after he had stated them, is without merit when there is no legal principle involved beyond the doctrine of reasonable doubt, on which the judge correctly charged; and an error in an instruction upon a count in the indictment, on which the defendant was acquitted, is rendered harmless by the verdict. *Ibid.*

56. *Appeal and Error—Instructions—Evidence—Error Cured—Homicide.*—Upon the trial for a homicide, evidence of bad feeling between the prisoner and his wife's family if erroneously admitted, the error cured by the judge afterwards telling the jury that they must not consider it in rendering their verdict. *S. v. Lovelace*, 763.

57. *Appeal and Error—Contentions—Instructions—Objections and Exceptions.*—Error in the misstatement of the trial judge of the contention of the appellant must be called to the attention of the judge at the time, to afford him an opportunity to correct it, or it will not be considered on appeal. *S. v. Wiseman*, 785.

APPEAL AND ERROR—*Continued.*

58. *Appeal and Error—Objections and Exceptions—Evidence—Instructions—Misstatements—Larceny—Criminal Law.*—An inaccurate statement of the evidence by the judge in his charge to the jury must have been called to his attention at the time by the party complaining to have afforded him an opportunity to make whatever correction that was necessary, or an exception thereto will not be considered on appeal. *S. v. Caylor*, 807.

59. *Appeal and Error—Evidence—Nonsuit—Record.*—The Supreme Court. on appeal, will not pass upon a motion for judgment as of nonsuit upon the evidence when the record shows that all the material evidence for its consideration was not set out therein. *S. v. Kirkland*, 810.

60. *Appeal and Error—Objections and Exceptions—Unanswered Questions.* The answer expected of a witness to a question excepted to must be made to appear that the Supreme Court may pass upon its relevancy and materiality, or the exception will not be considered on appeal. *S. v. Yearwood*, 814.

APPEARANCE. See Attachment, 1; Attorney and Client, 1.

APPLICATION OF FUNDS. See Wills, 16.

APPOINTMENT. See Schools, 5.

ARREST. See Criminal Law, 11.

ARSON. See Evidence, 33; Criminal Law, 14.

ASSAULT. See Criminal Law, 10, 12; Appeal and Error, 53.

ASSESSMENT. See Drainage Districts, 1, 2.

ASSIGNMENT. See Mortgages, 9, 12; Carriers of Goods, 9.

ASSIGNMENTS OF ERROR. See Appeal and Error.

ASSUMED NAME. See Partnership, 1.

ASSUMPTION OF RISKS. See Employer and Employee. 2, 10; Evidence, 2; Instructions, 11.

ASSUMPSIT. See Vendor and Purchaser, 8.

Assumpsit—Indebitatus Assumpsit—Carriers of Mail—Postmasters—Delivery of Mail—Party Benefited—Contracts.—Under the equitable principle of *indebitatus assumpsit*, it is *Held*, that where a storekeeper in a town was also postmaster, and believing that as such it was a part of his official duties to deliver the mail at the train, had done so for four years when, in fact, this was the duty of the carrier, for which it had received compensation under its contract with the United States Government, the railroad company knowingly receiving the benefit from such services is liable for them. *Sanders v. Ragan*, 172 N. C., 612, cited and approved. *Blackwood v. R. R.*, 342.

ATTACHMENT. See Vendor and Purchaser, 3; Husband and Wife, 1.

Attachment—Affidavits—Motions—Actions—Appearance of Defendant—Jurisdiction—Pleadings—Issues.—Where attachment has been sued out as an ancillary process in an action, and the purchaser of the goods has accordingly levied upon them, in order to recover moneys he has paid, in advance, upon the purchase price, the general appearance and answer of the defendant renders the question as to the attachable interest of the plaintiff no longer jurisdictional, this not being raised in the pleadings and not being an issuable question as a matter of right; and objections of law or fact to the sufficiency of the affidavit, or in general to the validity of the attachment as ancillary to the principal demand, should be raised and presented by motion in the cause or, in some instances, by special objection to the form or amount of the judgment. *Richardson v. Woodruff*, 46.

ATTEMPT. See Criminal Law, 8.

ATTORNEY AND CLIENT. See Trials, 1; Judgments, 9, 15.

1. *Attorney and Client—Special Appearance—Written Authority—Statutes.* Upon special appearance of the attorneys of the husband whose property has been attached by the wife under the statute, for the purpose of dismissing the action, the court should, on motion made, require them to file their written authority. Rev., sec. 213. *Walton v. Walton*, 74.

2. *Attorney and Client—Express Authority—Principal and Agent—Evidence—Burden of Proof.*—Where there is evidence tending to show that the attorneys of the parties to a suit to engraft a parol trust on the title to lands had direct or specific authority to act therein for their clients, distinct from any implied by the relationship of client and attorney, an instruction to the jury that the burden of proof was upon the plaintiff was a proper one. *McFarland v. Harrington*, 190.

AUTOMOBILES. See Taxation, 9; Commerce; Negligence, 2.

Automobiles—Auto Trucks—Definition—Taxation.—Auto trucks come within the designation of automobiles used by our statute in taxing manufacturers of automobiles. *Motor Co. v. Flynt*, 399.

AUTO TRUCKS. See Automobiles.

AWARD. See Habeas Corpus, 2.

BALLOTS. See Elections, 2.

BANKRUPTCY. See Parties, 3.

BANKS AND BANKING. See Equity, 1; Carriers of Goods, 12; Principal and Agent, 2; Courts, 4.

1. *Banks and Banking—Deposits—Offset—Actions—Fi. Fa.*—A bank may offset the amount due by its depositor from the amount of his deposit, or this may be pleaded as a counterclaim by the bank, in a suit against it to recover the deposit, as a bill or action in the nature of a *fi. fa.* *Moore v. Trust Co.*, 118.

BANKS AND BANKING—*Continued.*

2. *Banks and Banking—Depositors—Signatures—Forgeries—Presumptions—Credits—Fraud—Checks—Payment.*—A drawee bank is presumed to know the genuineness of the signatures of its depositors, and when it accepts a forged check from another of its depositors and places it to his credit, it is considered as a payment of the check which, without anything further appearing, cannot be withdrawn; but where such other depositor is aware of the fact of forgery, endorses the check, and it is accordingly credited to him without knowledge of such facts on the part of the bank, the bank may return the check to such depositor and rightfully charge his account therewith, without reference to any fraudulent intent on his part. *Woodward v. Trust Co.*, 184.

3. *Banks and Banking—Negotiable Instruments—Holders—Due Course—Indorsers—Guarantees—Statutes.*—The liabilities of an endorser of a negotiable instrument are, under the law, only in favor of a holder in due course, and do not attach when the payer of a check indorses it to the drawee bank, which simply pays out of the drawer's funds in its hands. *Ibid.*

BENEFITS. See Instructions, 3; Evidence, 17.

BIDDER. See Mortgages, 15.

BILLS OF LADING. See Carriers of Goods, 2, 4, 11, 12, 21; Interstate Commerce, 1; Judgments, 3.

BIGAMY.

1. *Bigamy—Criminal Law—Statutes—Courts—Jurisdiction—Bigamous Cohabitation -Constitutional Law.*—The amendment to Rev., 3361, ch. 26, Public Laws 1913, making it a felony and punishable as in cases of bigamy, for a married person to marry again, in another State, which would have been bigamous if contracted here, and "thereafter cohabit with such person in this State," does not attempt to confer extra territorial jurisdiction upon our own courts, the offense for which the person is tried, being one committed here. *S. v. Moon*, 715.

2. *Bigamy—Criminal Law—Statutes—Trials—Place Offense was Committed—Venue—Bigamous Cohabitation.*—A plea in abatement upon the ground that Rev., 3361, as amended by ch. 26, Public Laws 1913, makes the offense of bigamy and not the offense of bigamous cohabitation triable in the county in which the offender should be apprehended, is bad. *Ibid.*

BLOODHOUNDS. See Criminal Law, 19.

BONDS. See Constitutional Law, 2, 3, 5, 6, 9, 12, 13, 14, 17, 20, 22; Counties, 4, 5, 6; Taxation, 1; Statutes, 7.

BONDS FOR TITLE. See Deeds and Conveyances, 20.

BOUNDARIES. See Deeds and Conveyances, 2, 16.

1. *Boundaries—Deeds and Conveyances—Declarations—Evidence—Interest—Ante Litem.*—Where boundaries to lands are in dispute, and the judge has cautioned the witness not to testify to the declarations of living or interested persons, etc., a general objection to this evidence

BOUNDARIES—*Continued.*

will not be sustained, the rule being that declarations concerning boundaries must have been made *ante litem motam*, that declarant be dead when they were offered, and be a disinterested person, and it will be taken that the rule was complied with, unless the contrary appears. *Singleton v. Roebuck*, 201.

2. *Boundary—Title—Evidence—Questions for Jury—Nonsuit—Trials.*—Upon the question of boundary between adjoining lands involving title, the plaintiff claimed the northern half and the defendant the southern half of the original tract from the same owner, and plaintiff's evidence tended to show that the boundary as marked and claimed by him, by eliminating the width of the railroad right of way, would sustain his contention, and that this line was marked and established, and the plaintiff bought with knowledge thereof; and that plaintiff had been in adverse possession of the *locus in quo* for thirty or forty years: *Held*, sufficient for the determination of the jury, and a judgment as of nonsuit was properly disallowed. *Brown v. Blue*, 334.

BRIDGES. See Constitutional Law, 2, 3; Counties, 1, 2, 3, 4; Railroads, 3; Municipal Corporations, 1, 2, 3, 4; Evidence, 10, 11, 12; Appeal and Error, 23.

BRIEFS. See Appeal and Error, 33.

BURNINGS. See Criminal Law, 18.

BURDEN OF PROOF. See Homicide, 4, 16; Legal Tender, 1; Appeal and Error, 9, 16; Insurance, Life, 1; Mortgages, 6; Telegraphs, 1; Carriers of Goods, 8; Trusts, 6; Attorney and Client, 2; Instructions, 2, 9; Vendor and Purchaser, 9; Negligence, 3; Homicide, 3.

CALLS. See Appeal and Error, 18.

CANCELLATION. See Vendor and Purchaser, 10; Equity, 3.

CAPIAS. See Homicide, 15.

CARMACK AMENDMENT. See Carriers of Goods, 2.

CARRIERS. See Commerce, 2.

CARRIERS OF GOODS. See Vendor and Purchaser, 1; Employer and Employee, 5; Judgments, 3; Equity, 1; Principal and Agent, 2; Courts, 2; Parties, 4; Contracts, 10.

1. *Carriers of Goods—"Order, Notify"—Title—Consignors—Disposition of Goods.*—Ordinarily the consignor of a shipment by common carrier of goods, "to order of consignor, notify," retains the title sufficiently to control the route, destination and delivery, unless he has by assignment of the bill of lading or contract for value creating an interest in the goods deprived himself of his rights over them. *McCotter v. R. R.*, 159.

2. *Carriers of Goods—Commerce—Production of Bill of Lading—Waiver—Negligence—Connecting Carriers—Carmack Amendment.*—The delivering carrier of a shipment by interstate carriage refused delivery to

CARRIERS OF GOODS—*Continued.*

the person designated on account of his failure to produce the bill of lading, which had been mislaid or lost, and the goods were thereby damaged. There was evidence tending to show that the consignor arranged with the initial carrier for delivery without requiring the production of the bill of lading, which promptly informed the delivering carrier by telegram before the damages complained of had occurred: *Held*, the delivering carrier was not exonerated by the mere failure of the consignee to produce the bill of lading under the evidence if found as facts by the jury, and a motion as of nonsuit against the initial carrier was properly denied, such carrier being responsible for acts of the delivering carrier under the Carmack and like amendments to the Interstate Commerce Act. *Ibid.*

3. *Carriers of goods—Evidence—Negligence—Nonsuit.*—Where there is evidence tending to show that the negligent delay of the carrier in transmitting or delivering a consignment of potatoes caused the shipment to be ruined by cold weather, a motion as of nonsuit on the evidence by the carrier in an action against it for damages, will be denied. *Ibid.*

4. *Carriers of Goods—Bills of Lading—Negligence—Damages—Claims—Statute—Interstate Commerce.*—A statement given by the consignee by the delivering carrier of the interstate shipment, within the statutory ninety days, giving full notice of the claim, showing the amount, nature and value of the shipment, the date and address, the car in which the goods were sent, its arrival at destination, and the condition of the goods, is a sufficient compliance with the requirements of the bill of lading as to notice of the claim. *Ibid.*

5. *Carriers of Goods—Transportation—Negligence—Claims—Notice—Conditions Precedent.*—Where damages are caused to a shipment of goods by the negligence of the carrier in their transportation and delivery, no notice to or claim on the carrier for such damages shall be required as a condition precedent to the recovery therefor. *Ibid.*

6. *Carriers of Goods—Negligence—Connecting Lines—Initial Carriers—Evidence—Questions for Jury.*—There was evidence that an interstate carrier by water transported several carload shipments of potatoes to a point within the State, where the shipper had them assorted, and then they were taken in several carload lots to a point in another State, and thence, upon telegraphed instructions, one of them was reconsigned to a still further point, the transportation by rail being over connecting carriers. On one of these shipments originating by boat, which went to a place in this State and was reshipped from there under a new bill of lading by defendant, the destination was left blank in the bill of lading issued by the carrier by water: *Held*, the steamboat company cannot be held as the initial carrier, as a matter of law, and it was properly left to the jury, under the conflicting evidence, to determine whether it or the first carrier by rail was the initial one, and therein the bills of lading were competent evidence of the intent of the contracting parties and of the true contract of shipment. *Trading Co. v. R. R.*, 175.

7. *Carriers of Goods—Interstate—Initial Carriers—Negligence—Damages—Federal Statutes.*—Under the Carmack amendment to the Federal

CARRIERS OF GOODS—*Continued.*

statute the initial carrier of interstate freight is liable to the party aggrieved or suffering loss by reason of the carrier's negligence in transporting the shipment, on whichever of the connecting carriers such loss may have occurred. *Ibid.*

8. *Carriers of Goods—Intermediate Carrier—Negligence—Burden of Proof—Damages.*—An intermediate carrier in the line of connecting carriers of interstate freight is responsible for loss or damage arising to the shipment through its own negligence, with the burden of proof on it, when sued for damage to the goods, to show that the negligence had not occurred on its own line. *Ibid.*

9. *Carriers of Goods — Negligence — Damages — Equitable Assignment — Party Aggrieved.*—The rule that where a shipment of goods is delivered to the carrier addressed to the consignee, the latter is the party aggrieved and the only one entitled to maintain his action against the carrier for loss or damage resulting to the shipment through the carrier's negligence, does not apply when it appears that the consignor and consignee have by their agreement or contract changed this ordinary rule, as where the consignee, with the consent of the consignor, has deducted the amount of such damage from the purchase price and the consignor had accordingly accepted the settlement, for such is, in effect, equitable assignment by the consignor of his right to recover of the carrier, and the consignor may maintain his action therefor. *Ibid.*

10. *Carriers of Goods—Consignee—Inspection—Damages—Refusal—Consignor—Party Aggrieved.*—A consignee of goods shipped to him has a reasonable right of inspection before accepting them from the carrier, and to reject them if damaged by the carrier's negligence; and where the consignee has accepted such damaged shipment under an agreement with the consignor that such damages be deducted from the purchase price, the consignor may recover them from the carrier, as the party aggrieved. *Ibid.*

11. *Carriers of Goods—Exchange Bills of Lading—Reconsignment—Same Shipment.*—The exercise by the consignor of his right to have a shipment of goods reconsigned *in transitu* at an intermediate point, under an exchange bill of lading, does not constitute, in law, two separate and distinct shipments. *Ibid.*

12. *Carriers of Goods—Banks and Banking—Collection—Bills of Lading—Title—Ownership—Freight Charges—Railroads.*—Where a carrier deals with the mortgagor of goods, under a duly registered mortgage for their transportation, and looks alone to him for the freight charges thereon, and issues its bill of lading marked "freight prepaid," the title to the goods does not pass to the bank by reason of its taking the draft, bill of lading attached, for collection, and it may not be held liable for the freight charges as owner thereof. *R. R. v. Simpkins*, 274.

13. *Carriers of Goods—Placing of Cars—Understanding of Agent—Instructions—Railroads.*—Where damages are sought to be recovered for the omission or neglect by the carrier to place a refrigerator car for a shipment of lettuce at a certain place and time upon the request of

CARRIERS OF GOODS—*Continued.*

the consignor's agent, and the evidence tends to show that the request was made under such circumstances that the defendant's agent, exercising reasonable intelligence and care, may have misunderstood it, an instruction based upon the understanding of the order by the agent of the defendant is not objectionable on the plaintiff's appeal. *Futch v. R. R.*, 282.

14. *Carriers of Goods—Placing of Cars—Rules—Waiver—Railroads.*—The carrier is entitled to reasonable notice from the shipper for placing a car to be loaded, and when written notice is required by its rules, the rule may be waived or abandoned by a verbal agreement. *Ibid.*

15. *Carriers of Goods—Statutes—Penalties—Delays in Transportation—Constitutional Law.*—Our statute, Revisal, sec. 2632, imposing upon a railroad company a penalty for the delay in the transportation of an intrastate shipment is in the nature of a police regulation and constitutional and valid. *Owens v. Hines*, 325.

16. *Carriers of Goods—Federal Control—Parties—Director of Railroads—Orders—Statutes—Penalties—Police Regulations.*—Under the express provision of the General Order of the United States Railroad Administration No. 50, issued 28 October, 1918, requiring that the Director General of Railroads be the party defendant in certain actions that theretofore could have been brought against a common carrier, "actions, suits or proceedings for the recovery of fines, penalties and forfeitures" are excluded; which is in conformity with the act of 21 March, 1918, sec. 10, an action to recover the statutory penalty for the carrier's unreasonable delay in transporting an intrastate shipment, brought in the State court, should be against the carrier alone. Rev., 2632. *Ibid.*

17. *Same—Pleadings—Amendments—Courts—Appeal and Error.*—Where the action is to recover from the carrier the value of a lost part of an intrastate shipment as well as the statutory penalty (Revisal, 2632) for an unreasonable delay in the transportation of the whole thereof, the Director General of Railways is a necessary party as to the recovery of the value of the part lost, and it is not error for the Superior Court to permit an amendment to the complaint to this effect; and where the value of the lost goods has subsequently been paid into court a judgment for the statutory penalty will be affirmed on appeal. *Ibid.*

18. *Carriers of Goods—Express Companies—Contracts—Negligence—Notice—Damages—Delay of Delivery.*—The object of an express company is to secure prompt and safe delivery of goods it receives for transportation; and where, upon the shipment of carpenter's tools, the shipper has notified the company of the necessity for prompt delivery at destination, which the latter has promised by a certain day, the transaction is sufficient to put the express company on notice that damages will reasonably result to the shipper for consequent expenses, loss of time as a carpenter for the want of the tools, etc., if not delivered, and such are recoverable in the event of a protracted and unreasonable delay, proximately caused by the carrier's negligence. *Pendergraph v. Express Co.*, 344.

CARRIERS OF GOODS—*Continued.*

19. *Carriers of Goods—Negligence—Damages—Minimizing Loss.*—Where a shipper by express has been damaged by the negligence of the carrier in delivering the shipment, it is the duty of the shipper to reasonably lessen the amount, and for the judge to so charge the jury. *Ibid.*

20. *Carriers of Goods—Express—Nondelivery—Damages—Value of Goods—Verdict—Instructions.*—Where a shipper sues in a justice's court within its jurisdiction for the nondelivery of the goods, including both the value of the goods and the consequent damages from the delay, the trial on appeal in the Superior Court will not be disturbed because of delivery having later been made, where it appears that the verdict excluded under the evidence and instructions of the court, the value of the goods, and only included the damages the plaintiff had sustained by reason of the delay. *Ibid.*

21. *Carriers of Goods—Express Companies—Negligence—Bills of Lading—Contracts—Void Stipulations.*—An express company, as a common carrier, cannot make a valid stipulation in its bill of lading, against its own negligence, by a provision that a recovery exceeding fifty dollars cannot be had if the goods to be transported "were hidden from view." *Ibid.*

CARRIERS OF MAIL. See Assumpsit, 1.

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Ejection from Train—Tort—Change of Train—Damages.*—A carrier of passengers should stop its train at a station for which a ticket had been sold with assurance by the ticket agent that this particular train would stop there; and upon further evidence tending to show that the train had theretofore stopped at this station, and, *per contra*, that to reach the passenger's destination it was necessary to change cars and that the assurance to the contrary had not been given the passenger, a requested instruction for the defendant directing a verdict on the issue of wrongful ejectment in causing her to change cars, is properly refused, the plaintiff's damage being at least nominal, and such other as was the proximate or natural result of the tort. *Blaylock v. R. R.*, 353.

2. *Same—Proximate Cause—Remote Results.*—Where a passenger has purchased a through ticket to her destination and has been wrongfully ejected from the train at an intermediate point to take another of defendant's trains, which would soon have carried her thereto, and instead of availing herself of the comfortable accommodations furnished by the defendant at the transfer point, concluded, without inquiry, to take a trolley car, damages for injuries received on the trolley car, and in consequence of having to walk beyond its line to her destination, are too remote to permit of their recover. *Ibid.*

3. *Carriers of Passengers—Damages—Evidence—Negligence—Contributory Negligence.*—Where, in a personal injury action, a passenger has a good cause of action for being ejected by the carrier from the train before reaching her destination, so that nominal damages are at least recoverable, her subsequent conduct relating to injuries received by her, when competent, is material on the issue of damages and not on the issue of contributory negligence. *Ibid.*

CARTWAYS. See Courts, 3.

CENSUS. See Taxation, 11.

CERTIORARI.
Certiorari—Appeal—Questions of Fact.—The Supreme Court does not pass upon the facts upon motion for a *certiorari. S. v. Bridges*, 733.

CHANCE. See Lotteries, 2.

CHARACTER. See Evidence, 32, 33.

CHARTER. See Railroads, 1.

CHATTELS. See Mortgages, 16.

CHILDREN. See Wills, 5; Municipal Corporations, 4; Estates, 2, 3; Witnesses, 1.

CHIROPRACTICS, 9.

CIRCUMSTANCE. See Spirituous Liquors, 1.

CITIES AND TOWNS. See Appeal and Error, 4, 18, 23; Railroads, 3; Municipal Corporations, 1, 4, 5, 7, 8, 9, 10, 11; Negligence, 1; Statutes, 10, 12, 17; Elections, 1, 2; Contracts, 11.

CLAIMS. See Carriers of Goods, 4, 5.

CLERKS OF COURT. See Interpleader, 1; Appeal and Error, 37.

1. *Clerks of Court—Executors and Administrators—Granting of Letters—Actions—Collateral Attack—Jurisdiction—Appeal and Error.*—Where the clerk of the Superior Court has issued letters testamentary upon sufficient evidence, his action in doing so cannot be collaterally attacked, to oust jurisdiction, in the administrator's action, as such, to recover upon an insurance policy, but only before the clerk to cancel the letters; nor can it be raised for the first time in the Supreme Court, on appeal, when it has not been pleaded, and upon exception to a refusal of defendant's motion to nonsuit. *Wharton v. Ins. Co.*, 136.

2. *Clerks of Court—Funds—Adverse Claimant—Identification—Judgments—Mortgages.*—A contest as to the ownership of surplus funds paid into the hands of the clerk of the Superior Court under execution on a judgment obtained upon notes secured by mortgage, was made to depend upon whether or not the plaintiff was served with summons in the former action, and the defendant having testified that he had been served, and not his son with a similar name: *Held*, it was proper to permit him to be cross-examined as to the mortgage notes and credits thereon, for the purpose of identifying the plaintiff as the one who had been served in the former proceedings. *Chamberlain v. Dunn*, 655.

CLOUD ON TITLE. See Limitation of Actions, 4; Actions, 3.

CODICILS. See Wills, 1; Limitation of Actions, 1.

COLD STORAGE. See Evidence, 1.

"COLOR." See Limitation of Actions, 2, 3; Deeds and Conveyances, 18; Taxation, 3, 6; Husband and Wife, 8.

COMMERCE. See Carriers of Goods, 2; Constitutional Law, 11; Telegraphs, 1, 2, 3; Railroads, 4.

Commerce—Automobiles—Demonstrations—Direct Sales—Auto trucks consigned to selling agents from other States and warehoused in this State, though used for demonstration purposes, but sold to customers therefrom, are not in interstate commerce, and our statute taxing them is not in contravention of Art. 1, sec. 8 (3), of the Federal Constitution. *Motor Co. v. Flynt*, 399.

COMMERCE COMMISSION. See Interstate Commerce, 2.

COMMISSION GOVERNMENT. See Statutes, 10, 12.

COMMISSIONS. See Principal and Agent, 6.

COMMON LAW. See Statutes, 13, 15; Courts, 6; Homicide, 14.

COMPUTATION OF TIME. See Judgments, 2.

CONFESSIONS. See Criminal Law, 11.

CONSENT. See Mortgages, 12; Wills, 17; Appeal and Error, 48; Judgments, 15; Criminal Law, 10.

CONSIDERATION. See Contracts, Municipal Corporations, 9.

CONSOLIDATED STATUTES.

CHAP.

238, sec. 8 (5). When husband's cruel conduct causes wife to leave, he is not the injured party and entitled to divorce. *Sanderson v. Sanderson*, 339.

CONSPIRACY. See Criminal Law, 1, 2; Evidence, 30; Indictments, 2, 3.

CONSTITUTION, FEDERAL.

ART.

I, sec. 8, clause 2. A telegraph company, by unnecessarily relaying an intrastate message beyond the State, may not oust jurisdiction of our courts as to the mental anguish doctrine. *Speight v. Tel. Co.*, 146.

I, sec. 8 (3). Auto trucks kept in warehouses in this State, used for demonstration but sold from there, not interstate commerce, and reduction of tax according to manufacturer's investment here, is not discriminatory. See, also, Art. IV, sec. 2; Art. VIV, sec. 1. *Motor Co. v. Flynt*, 399.

CONSTITUTION, STATE.

ART.

II, sec. 14. An amendment to a statute requiring "aye" and "no" vote, making a material change, is unconstitutional. *Road Commission v. Comrs.*, 62.

CONSTITUTION, STATE—*Continued.*

ART.

II, sec. 29. Statute authorizing bonds for a systematic and comprehensive building of county roads not invalid. *Comrs. v. Pruden*, 394.

II, sec. 29. Legislature may authorize issue of county bonds for road purposes. *Comrs. v. Trust Co.*, 170.

V, sec. 1. Taxes for "current and necessary expenses" are for the ordinary expenses of the county, and void if in excess of constitutional requirement. *R. R. v. Comrs.*, 449.

V, sec. 3. License tax on manufacturers according to investments of assets here not discriminatory. *Motor Co. v. Flynt*, 399.

VII, secs. 3, 4, 5, 6. These provisions subject to sec. 14, giving the Legislature power to change, modify, or abrogate. *Motor Co. v. Flynt*, 399.

VII, sec. 14. Under this section the Legislature may modify, change, etc., provisions of secs. 3, 4, 5, 6. *Road Commission v. Comrs.*, 62.

X, sec. 1. Homestead must be laid off before execution. Personal property exemption may be claimed up to final process. *Befarrah v. Spell*, 231.

X, sec. 6. Written assent necessary to wife's conveyance of her lands. *Sills v. Bethea*, 315.

X, sec. 6. Rev., sec. 2116, dispensing with written consent of husband to conveyance by wife of her land when he is an idiot or lunatic, is not unconstitutional. *Lancaster v. Lancaster*, 22.

XI, sec. 9. This does not render unconstitutional as local, private, or special legislation an act authorizing issuance of bonds to build a bridge and approaches of adjoining counties and apportioning the costs. *Martin County v. Trust Co.*, 26.

CONSTITUTIONAL LAW. See Statutes, 11; Counties, 1, 2, 3, 4; Vendor and Purchaser, 5; Railroads, 3; Criminal Law, 5, 6; Wills, 23; Bigamy, 1; Carriers of Goods, 15; Schools, 1; Taxation, 9, 10.

1. *Constitutional Law—Husband and Wife—Lunatic—Statutes—Deeds and Conveyances.*—The provisions of the Revisal, sec. 2116, dispensing with the necessity of the written consent of the husband to the conveyance by the wife of her lands when he has "been declared an idiot or a lunatic" is not inhibited by our State Constitution, Art. X, sec. 6, or in conflict with Revisal, sec. 1898, providing for proceedings by petition before the clerk to obtain an order of sale, the remedy given by these two sections being in the alternative, and optional by the wife as to which may be pursued. *Lancaster v. Lancaster*, 22.

2. *Constitutional Law — Counties — Highways—Bridges—Bonds—Taxes—Statutes.*—A legislative enactment, ch. 53, Public-Local Laws 1919, authorizing the issue of bonds by two adjoining counties to build a bridge and its approaches through a swamp in one of them, over a stream dividing them, specifying that the bonds shall not exceed the actual cost of said bridge and road, and apportioning the issuance three-fourths to the one and one-fourth to the other, is not in contravention of our State Constitution, though the bridge and its approaches specified in the act are within the county authorized only to issue bonds in the smaller amount. Rev., sec. 2695, amended by ch. 185, Laws 1919; ch. 312, Laws 1919. *Martin Co. v. Trust Co.*, 26.

CONSTITUTIONAL LAW—*Continued.*

3. *Constitutional Law — Counties— Statutes—Highways—Bridges—Taxation—Bonds—Local Acts.*—A public-local act authorizing two adjoining counties by joint action to build and construct a bridge over a dividing stream as already surveyed and laid out, with an approach thereto in one of the counties, and for the purpose to issue bonds in given proportions not to exceed the cost of the work, and to levy a tax to pay interest on the bonds and provide a sinking fund, is not such local, private or special legislation as is forbidden by constitutional amendment (sec. 29, Art. XI), the necessary part of the act being to authorize a special tax. *Ibid.*

4. *Constitutional Law — Counties—Statutes—Taxation—Limitation—"Approval"—Sinking Fund.*—Chapter 103, Laws 1917, as amended by ch. 185, Laws 1919, and ch. 312, Laws 1919, relating to the issuance of bonds and the levy of taxes for county road and bridge purposes, as also ch. 53, Public-Local Laws 1919, as to Martin and Bertie counties, meet the constitutional requirement of "special approval of the General Assembly" required to levy a tax beyond the constitutional limitation; and a provision limiting the amount of the bonds to the "actual cost" of a bridge and its "approach" is not a prohibition against issuing the bonds before the work is done, for whatever sum that may remain over such cost may be invested in the sinking fund provided in the statute. *Ibid.*

5. *Constitutional Law—Statutes—Amendments—Counties—Municipal Corporations—Bonds.*—Where a proposed issue of bonds by a municipality has been favorably voted upon under the provisions of a constitutional statute, restricting the rate of interest, but the rate of interest allowed has been increased by a later and unconstitutional amendment, and the election has been held with reference to the increased rate, the increased rate over that authorized by the valid statute may be disregarded and the proper municipal authorities may issue valid bonds at the rate of interest authorized in the prior statute, in accordance with its terms. *Guire v. Comrs*, 39.

6. *Constitutional Law—Municipal Corporations—Bonds—Sales—Adjourned Meetings—Statutes.*—Where the municipal authorities have advertised the sale of bonds to be issued according to the terms of a valid statute, and cannot finish the transaction and consummate the sale on the day designated in the advertisement, they may adjourn over to some other day in the near future for the purpose of completing the matter, especially when they have given due notice of the second meeting, the object of the law being to prevent clandestine sales of bonds of this character. *Ibid.*

7. *Constitutional Law—Taxation—Municipalities—Statutes.*—The provisions of Art. VII of our State Constitution, secs. 3, 4, 5, 6, relating to municipal taxation, are subject to those of section 14 thereof, to the effect that the Legislature shall have power by statute to modify, change or abrogate any or all provisions of the sections enumerated. *Road Comrs. v. Comrs.*, 61.

8. *Constitutional Law—Taxation—Townships—Counties.*—Article II, sec. 14, of our Constitution, requiring that statutes for creating or imposing taxes shall be passed by readings on separate days, with "aye"

CONSTITUTIONAL LAW—*Continued.*

and "no" vote, etc., refers in express terms to State, counties, cities, and towns, and applies to townships also as constituent parts of counties. *Ibid.*

9. *Same—Amendments—Bonds—Material Changes.*—Chapter 279, Public Laws 1917, purports to amend ch. 122, Public Laws 1917, and the former act was not passed in accordance with the formalities as to its separate readings with the "aye" and "no" vote taken as required by Art. II, sec. 14, of our State Constitution: *Held*, the amendment purported to change the method of maintaining a separate township road system from a bond issue restricted in amount to current taxation from year to year, etc., and made a material change in the valid act it proposed to amend, and is unconstitutional, and the commissioners are without authority to levy the tax specified in the later act. *Ibid.*

10. *Constitutional Law—Stock Law—Repealing Statutes—Funds on Hand—Distribution—County Funds—Counties.*—Where, by legislative enactment, a county has been placed under a stock law, the statute directing that stock law fences shall be sold and the proceeds derived from the sale, and any stock-law funds on hand, shall be returned to the general fund of the county, is mandatory and also constitutional. *Parker v. Comrs.*, 92.

11. *Constitutional Law—Federal Government—State's Rights—Commerce—Telegraphs.*—The power to regulate commerce among the several States, etc., is delegated to the Federal Government by Art. I, sec. 8, clause 2, of the Federal Constitution, and the right to regulate intrastate commerce is among those reserved to the State under the tenth amendment; and where a telegram is of intrastate character, the jurisdiction of the State courts may not be ousted by the telegraph company unnecessarily relaying it at its offices in another State. This will not change it into an interstate message. *Speight v. Tel. Co.*, 146.

12. *Constitutional Law—Counties—Roads and Highways—Taxation—Bonds—Special Statutes.*—An act of the Legislature authorizing the issuance of county bonds for its public roads is not in contravention of the Constitution, sec. 29, Art. II, prohibiting the passage of "any local, private or special act authorizing the laying out, opening, altering, maintaining or discontinuing highways." *Comrs. v. Trust Co.*, 170.

13. *Constitutional Law — Taxation — Counties — Townships—Exchange of Bonds.*—The Legislature authorized a county to issue $500,000 of its bonds for the roads therein, $349,000 for exchange for township bonds theretofore issued by the townships for its own road purposes if it can be arranged, but if the holders should refuse to accept the exchange, the issuance of the county bonds to be reduced to that extent: *Held*, the validity of the county bonds is not affected by this provision, especially as to the remaining $151,000 of bonds to be directly sold; or, as to them, by a further provision requiring notice to be given to the holders of the township bonds. *Ibid.*

14. *Constitutional Law—Counties—Roads and Highways—Taxation—Bonds—Mandamus.*—A limitation in an act authorizing a county to issue bonds for road purposes, to 40 cents on the $100 and $1.20 per poll

CONSTITUTIONAL LAW—*Continued.*

for a sinking fund, interest, etc., will be presumed as sufficient; but if otherwise the validity or constitutionality of the bonds would not be affected, the remedy being by *Mandamus* to apply the proceeds of the levy to the payment of interest and maintenance, leaving the principal of the bonds to be provided for at maturity. *Ibid.*

15. *Constitutional Law—Counties—Roads and Highways—Taxation—Limitation—Statutes.*—County bonds for road purposes are for a "necessary expense," and if the levy of a tax therefor provided in the act should be found insufficient, taxes therefor can be levied under the general statutes, authorizing counties to construct roads and bridges. Ch. 103, Laws 1917, amended by ch. 185, Laws 1919. *Ibid.*

16. *Constitutional Law—Taxation—Limitations—Counties—Roads and Highways—Statutes.*—The approval of the Legislature to the county levying a tax for road purposes in excess of the constitutional limitation may be given by a general act giving an option to any county to avail itself thereof. *Ibid.*

17. *Constitutional Law—Counties—Roads and Highways—Taxation—Bonds—Sales—Advertisement—Notice—Statutes.*—Where the statute for the issuance of county bonds for road purposes provides that previous advertisement of notice for the sale of these bonds shall be given for thirty days, an advertisement for once a week, beginning more than thirty days before the sale, is a compliance with the statute; and were it otherwise, in this case, the general statute later passed at the same session of the Legislature, permitting the sale of such bonds by the commissioners at public or private sale, removes the requirement as to notice. *Ibid.*

18. *Constitutional Law—Husband and Wife—Written Consent—Deeds and Conveyances—Contracts.*—The written consent of the husband is necessary to a valid conveyance by the wife of her lands. Const., Art. X, sec. 6. *Sills v. Bethea*, 315.

19. *Same—Death of Husband—Mortgages—Sale—Election.*—Without the written consent of her husband, the wife attempting to convey her lands, took a mortgage back to secure the balance of the purchase price, and, after the death of her husband, advertised the land under the power of sale in the mortgage, but withdrew it after tender of principal, interest, and costs by the mortgagor and brought action of ejectment, in which the defendant asked for specific performance: *Held*, having by the foreclosure proceedings elected, after the death of her husband, to receive the money for her land, she will not be permitted to claim it on the ground that her deed, without the written consent of her husband, was invalid to pass the title. *Ibid.*

20. *Constitutional Law—Amendments—Roads and Highways—Counties—Bonds, Proceeds of Sale of—Local Legislation—Statutes.*—The Legislature, in 1915, authorized a certain county to issue bonds, declaring its purpose "to provide for a uniform, comprehensive, and practical system of roads in the county, calculated in a general way to serve the needs of every section," and for a wise, judicious, and equitable distribution of the funds so that each township and section of the county should be benefited to the advantage of the county as a whole.

CONSTITUTIONAL LAW—*Continued.*

One-half of the bonds having been issued, and the proceeds found to be insufficient, and by the act of 1917, the amount authorized in 1915 having been reduced one-half, the Legislature in 1919 increased the issue to the amount authorized under the act of 1915, to carry out its spirit and intent, leaving its other provisions unchanged, but with the further provision that a certain part of the proceeds be applied to paying the expense of laying out and constructing a road in each township, the route or course thereof to be so laid as "to serve the best interests of the township." *Held*, the act of 1919 does not come within the inhibition of the recent amendment to the Constitution, Art. 2, sec. 29, as to the enactment of "any local, private, or special act authorizing the laying out, opening or discontinuing of highways." *Comrs. v. Pruden*, 394.

21. *Same—Control of Funds.*—An act of the Legislature may prescribe a rule by which the proceeds of the sale of bonds it authorizes a county to issue for road purposes, shall be disbursed and distributed in order to effect the best results, when it is confined to the control and management of the funds, and leaves to the local authorities the power given them by the recent constitutional amendment over "the laying out, opening, or discontinuance of highways." *Ibid.*

22. *Constitutional Law—Municipalities—Counties—Statutes—Public-Local Laws—Taxation—Bonds.*—A public-local law authorizing the board of county commissioners to issue and sell bonds to construct and build public roads of that county is constitutional and valid. *Davis v. Lenoir*, 668.

23. *Constitutional Law—Taxation—Roads and Highways—Tax—Necessary Expense.*—Bonds issued by a county for constructing and building its public roads are for a necessary expense within the meaning of Art. VII, sec. 7, of the State Constitution. *Ibid.*

24. *Same—Approval of Voters—Elections—Majority Vote Cast—Majority of Qualified Voters.*—It is within the discretion of the Legislature to authorize a county to issue bonds for road purposes, either with or without the approval of its voters, or to require only the approval by a majority of the votes cast at a special election authorized for the purpose, and the approval by the majority of the qualified voters is not required for their validity. *Ibid.*

25. *Constitutional Law—Roads and Highways—Necessary Expense—Taxation—Property and Polls—Equalization—Legislative Discretion.*—It is not required for the validity of county bonds issued for road purposes that the tax to be levied should observe the equation between the property and the poll, and the objection is untenable that such tax is to be levied upon property alone, the object being for a necessary county expense. *Ibid.*

CONTEMPT. See Injunction, 1.

1. *Contempt—Highways—Injunctions—Judgments—Punishment—Courts.*—Where a defendant has violated a preliminary injunction of a court having jurisdiction in a pending action, the court may, in proper instances, order the defendant to undo the wrongful act committed by

CONTEMPT—*Continued.*

him in violation of its order, and also defer the judgment punishing him for the contempt committed by him, to give him a chance to repent his unlawful act. *Keys v. Alligood*, 16.

2. *Contempt—Injunctions—Restoration—Mandatory Injunctions.*— Where the defendant has been enjoined until the final hearing in a pending action from obstructing a public highway, from which order he has not appealed, and has, in violation thereof, made changes in the highway contrary to the order, the court, after giving the defendant a proper hearing, has the power to issue a mandatory injunction to compel him to restore the road to its former condition. *Ibid.*

CONTENTIONS. See Instructions, 5, 6; Appeal and Error, 26, 28, 32, 41, 54, 57; Trials, 2.

CONTINGENCY. See Wills, 8, 13; Estates, 1; Wills, 2, 3.

CONTINUANCES. See Appeal and Error, 47.

CONTRACTORS. See Liens, 1.

CONTRACTS. See Options, 1; Employer and Employee, 1; Vendor and Purchaser, 2, 9, 10; Habeas Corpus, 2; Husband and Wife, 2; Torrens Law, 1, 3; Mortgages, 11, 13; Carriers of Goods, 18; Courts, 2; Assumpsit, 1; Damages, 6; Elections, 1; Limitation of Actions, 7; Evidence, 25, 26, 29; Insurance, Life, 1, 2; Courts, 1, 2; Deeds and Conveyances, 9, 20; Estoppel, 1; Interstate Commerce, 1; Judgments, 3, 8; Schools, 5; Constitutional Law, 18; Carriers of Goods, 18, 21; Assumpsit, 1; Copyrights, 1, 2; Materialmen, 1, 3.

1. *Contracts—Writings—Statute of Frauds—Timber—Deeds and Conveyances.*—The principle that contracts to cut and remove standing timber upon lands is not enforceable unless in writing applies only to executory contracts. *Davis v. Harris*, 24.

2. *Same—Breach—Damages.*—Where a parol executory contract to cut and remove standing timber upon lands at a certain price has not been reduced to writing and signed by the parties, etc., the grantor may not maintain his action for damages upon the ground that his contract was for the cutting of all the merchantable timber, and that the defendant had only cut the select timber at the agreed price; but after the timber has been cut and removed from the land the plaintiff may either recover the full injury to the lands from the trees cut down or removed or the full value thereof, unless he had otherwise agreed. *Ibid.*

3. *Same—Damages Minimized—Evidence.*—Where an executory contract to cut timber standing upon lands is void because not in writing, etc., the grantor may recover damages to the land caused by the grantee's cutting certain trees thereon and permitting them to remain and rot, the several trees being personalty; and though the grantor may be required to sell the trees to minimize his damages, he may prove an agreement of the grantee to take them at a certain price, as a reason why he has not done so. *Ibid.*

4. *Contracts—Ambiguity—Shrinkage—Potatoes—Parol Evidence.*— Where Irish potatoes are purchased to be placed in cold storage before ship-

CONTRACTS—*Continued.*

ment by the seller, and, after shipment, they are received from the carrier in a soft condition and sprouting, and the evidence is conflicting as to the meaning of a provision in the contract of purchase "that shrinkage be stood by the purchaser," the terms used are sufficiently ambiguous to be explained by parol, and their meaning is for the jury to determine. *Richardson v. Woodruff*, 46.

5. *Contracts—Deeds and Conveyances—Timber—Period for Cutting—Commencement—Breach—Enforcement.*—Where a contract for the cutting of timber allows a certain period of time in which the timber may be cut, etc., and provides that the time therefor shall commence after allowing a reasonable time for the grantee to finish cutting on his then location: *Held*, the provision as to the time within which the grantee shall commence to cut the timber is a material and enforceable one, and the grantee may not maintain his action to enforce his contract when it appears that he cut the timber upon other lands after he had finished cutting upon the lands allowed by the contract, and that he made no move to cut the timber upon the defendant's lands until eighteen months after the contract sued on was executed. *Hearne v. Perry*, 102.

6. *Contracts—Breach—Admissions—Damages—Evidence—Allegations—Contemplated Damages—Pleadings.*—The plaintiff and defendant contracted, among other things, that the plaintiff should raise Irish potatoes upon his own land and furnish them at a certain price to the defendant, in barrels the latter should supply by a specified time, and demanded damages for the defendant's failure to so furnish them. Without specific allegation the plaintiff attempted to show that he was also damaged in not having sufficient time, owing to defendant's breach of contract, to plant and mature for that season a crop of sweet potatoes on the same land. Upon plaintiff's admission to the effect that the defendant's failure to sooner deliver the barrels at an earlier date did not cause him damages, that he had sufficient barrels on hand, etc.: *Held*, no actual damages are recoverable; and as to the failure to raise the sweet potato crop, such damages were not alleged or shown to have been within the reasonable contemplation of the parties, and the evidence as to them was properly excluded. *Lee v. Upton*, 198.

7. *Contracts — Corporations— Subscription to Stock—Abandonment—Evidence—Trials.*—Upon this petition to rehear, the Court adheres to its former opinion (176 N. C., 281), except to permit, on the next trial, the defendant to offer evidence of abandonment of the building for which the plaintiff was incorporated, and brings action to recover balance of defendant's subscription to the shares of stock; and the petition is dismissed. *Improvement Co. v. Andrews*, 328.

8. *Contracts—Breach—Counterclaim—Evidence Inadequate.*—In this case the plaintiff sued to recover for services rendered under contract, and defendant set up a counterclaim for damages for plaintiff's breach thereof: *Held*, without discussion, the evidence of the counterclaim is too inadequate and uncertain to have submitted it to the jury, and judgment for plaintiff's demand was a proper one. *Bennett v. Plott*, 382.

CONTRACTS—*Continued.*

9. *Contracts—Questions of Law—Questions for Jury—Trials.*—What is the contract that was made by the parties is an issue of fact for the determination of the jury, but when it is admitted or proven, its meaning is a matter of law for the court. *Storey v. Stokes*, 409.

10. *Contracts—Carriers of Goods—Embargo—Tender of Shipment—Defenses—Evidence—Trials.*—Where an action is brought against the seller of lumber for his breach of contract in not shipping it, and it appears that the defendant has not tendered it for shipment, the fact that an embargo had been placed on shipments will not avail as a defense, where special permits for shipment had been secured by the other party, and especially where the determination of the controversy has been made to depend upon other matters. *Ibid.*

11. *Contracts—Breach—Vendor and Purchaser—Damages—Contemplation of Parties—Resale—Profits Prevented.*—Where the seller of lumber knew the purchaser was a wholesale dealer, who was selling under contract to others, and had so sold the lumber, and breached his contract for its delivery, the profits prevented thereby under contracts of sale made by the purchaser are held to be certain and capable of admeasurement, and within the reasonable contemplation of the parties at the time of making the contract, as a probable result of its breach, and may be included in the damages recoverable in the purchaser's action. *Ibid.*

12. *Contracts—Breach—Place of Delivery—Damages.*—*Held*, in this action to recover damages of the seller of lumber for his breach of contract in not shipping it, that, according to the shipping instructions and other evidence, the delivery was to be made in New York and the market price there could be used as the basis for the admeasurement of the damages. *Ibid.*

13. *Contracts—Breach—Vendor and Purchaser—Resales—Damages—Evidence.*—Where the plaintiff has made various contracts for the sale of lumber, based upon his purchase of the lumber for wholesale purposes from the defendant, with the latter's knowledge, it is competent for the plaintiff to show by his evidence his inability to perform his own contracts of sale, by reason of defendant's failure to ship the lumber, as bearing upon the measure of damage he has sustained by the said breach. *Ibid.*

14. *Contracts—Evidence—Lumber—Nonsuit—Trials—Questions for Jury.*—Upon allegation that defendant had breached his contract to sell the plaintiff three cars of lumber at a certain price per thousand delivered on cars at a designated place, and demand for damages in a certain sum, the plaintiff's evidence tended to prove he was in the lumber business, employed one S. to buy lumber, and he returned with and delivered to plaintiff a memorandum of contract for the three cars of lumber to be delivered at the certain price and place; that the memorandum he gave to plaintiff had been signed by the defendant; also, the maximum and minimum feet of lumber a car was to contain: *Held*, the evidence was sufficient for the determination of the jury as to the alleged contract, and a judgment as of nonsuit was improvidently entered. *Morrison v. Marks*, 429.

15. *Contracts—Breach—Damages—Profits.*—Profits on lumber, which defendant had failed to deliver under his contract, are only recoverable

CONTRACTS—*Continued.*

when fairly supposed to have been in the contemplation of the parties when making the contract, or naturally expected to follow its breach, being certain in their nature and cause; and in ascertaining them, the relation and business of the parties, the subject-matter, the defendant's knowledge, and other relevant circumstances may be considered. *Johnson v. R. R.*, 140 N. C., 577, cited and approved. *Ibid.*

16. *Contracts—Debtor and Creditor—Settlement—Payment—Agreement—Evidence—Trials.*—A subcontractor had a working agreement with his contractor with reference to several buildings the latter was erecting, that payments made the subcontractor were to be received and applied by him to any of the several jobs, and accounted for in the final settlement. The contractor failed, and the subcontractor sued the surety on his bond for the balance due him on one of these buildings, the "S. Hotel." Some of the checks given by the contractor had the entry, "S. contr.," or "S. Hotel," which the plaintiff claimed should be applied to the other buildings, but defendant claimed should be deducted from the amount due on the "S. Hotel," for which alone it was responsible, and to that extent reduce its liability: *Held*, evidence as to the working plan for credits of payments, agreed to before the issuance of the checks mentioned, was competent, and the charge of the court thereon was proper. *Long v. Guaranty Co.*, 503.

17. *Contracts—Corporation Commission—Orders—Increase of Price—Municipal Corporations—Cities and Towns—Corporations.*—The plaintiff gas company entered into a contract with defendant, a corporation engaged in finishing cotton fabrics, for the supply of gas at a certain schedule of rates, based upon actual consumption, which was approved by the State Corporation Commission, and, later, the Corporation Commission, upon the petition of the plaintiff, raised the rates relative to a certain town beyond the limits of which the defendant carried on its business, which were not subject to the ordinance or the governmental control of the town in any respect: *Held*, reading the order of the commission in connection with the petition, the order did not authorize the plaintiff to increase its rates of charges to the defendant, and the right of the commission to make a valid order increasing the rates above those specified in defendant's contract is not involved in the adjudication of the case. *Public Service Co. v. Finishing Co.*, 546.

18. *Contracts—Statute of Frauds—Void Contracts—Quantum Meruit—Quantum Valebat—Specific Performance—Equity.*—Where a verbal contract to convey land is void under the plea of the statute of frauds, and the grantee, in pursuance thereof, has rendered services and been put to expense, and the grantor has then refused to make the conveyance he had obligated himself to make, the grantee, having been induced by the grantor's promise, may recover as upon a *quantum meruit* the value of the services he has rendered, and in money or money's worth, and for the loss he has been directly occasioned by reason of the vendor's breach, though he is not entitled to specific performance. *Deal v. Wilson*, 600.

19. *Contracts—Statute of Frauds—Breach—Actions.*—The purchaser's action will immediately lie to recover upon a *quantum meruit* for his services rendered under a verbal contract to convey lands, void under

CONTRACTS—*Continued.*

the statute of frauds, upon the seller's refusal to make the deed agreed upon in the said contract. *Ibid.*

20. *Contracts—Evidence—Statute of Frauds—Breach.*—In this action to recover for services rendered and moneys expended under a verbal contract to convey lands, void under the statute of frauds, it is *Held*, that what the defendant said, either to the plaintiff or to others, relative to the contract, is competent evidence against him. *Ibid.*

21. *Same— Compensation— Specific Performance— Equity.*— Testimony explanatory of a parol contract to convey lands, void under the statute of frauds, merely tending to show the plaintiff's equitable right to recover compensation growing out of its breach and not for the purpose of enforcing specific performance or for damages because of its breach, is competent. *Ibid.*

22. *Contracts—Breach—Loss—Profits Prevented—Damages—Certainty of Admeasurement—Lessor and Lessee.*—Upon a breach of lessor's contract that he will maintain the water supply at a summer resort in the same condition as it was in at the time of the rental, and that his failure to have done so caused the guests to leave, the rule of the admeasurement of damages is that the injured party may recover all the damages, including gains prevented as well as loss sustained, as were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty. *Cary v. Harris*, 624.

23. *Contracts—Lessor and Lessee—Water Supply—Resorts—Leaving of Guests—Contemplation of Parties—Damages.*—The leaving of the guests at a summer resort for failure of the lessor to keep the water supply in proper condition, resulting in the inability of the guests to take baths and their apprehension from the insanitary conditions of toilets, sewers, etc., is a result reasonably within the contemplation of the lessor and lessee at the time of the making of the lease, entitling the lessee to such damages resulting from the lessor's breach as he may show with a reasonable degree of certainty. *Ibid.*

24. *Contracts— Breach— Lessor and Lessee— Resorts— Guests Leaving—Water Supply—Damages—Certainty of Admeasurement—Evidence—Questions for Jury—Trials.*—Where the lessor of a summer resort has breached his contract to maintain an ample water supply for the leased premises, causing thereby all the guests to leave, evidence is sufficiently certain on the question of the admeasurement of damages which tends to show that during former seasons and to the time of the breach the rooms and dining tables were practically fully occupied, from which a certain profit was realized, and that extra servants were necessary to carry water under the changed conditions, causing an extra expenditure of money, such evidence being the most intelligible that the nature of the case will permit. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Negligence; Employer and Employee, 6.

CONVERSION. See Husband and Wife, 4, 6; Libel and Slander, 1.

COPYRIGHTS.

1. *Copyrights—Principal and Agent—Contracts—Fraud—Evidence—Declarations—Patents.*—Where the defense to an action on a copyright for

COPYRIGHTS—*Continued.*

exclusive territory is the invalidity of the copyright and the consequent lack of consideration, testimony of the defendant's witness of the representations of the plaintiff's agent in inducing the contract, which were material and false, is competent evidence. *Savings Club v. Bank*, 403.

2. *Copyrights—Courts—Jurisdiction—Contracts—Defenses—State Courts —Evidence—Experts—Invalidity.*—While the State Court has no jurisdiction over actions directly affecting the validity of a copyright, it is competent in an action therein to recover upon a contract granting certain exclusive territory, for the defendant to show by the opinion of experts therein, in connection with evidence that others had invaded his territory, that the idea was not patentable, and the contract was without consideration, the State Court having ample jurisdiction when the validity of the patent and failure of consideration is set up as a defense. *Ibid.*

CORNERS. See Evidence, 9.

CORPORATIONS. See Contracts, 7, 17.

Corporations — Negligence— Damages— Successor Corporations— Express Companies—War Measures.—Where an express company that has received goods for transportation is not liable for damages thereto, neither can another and independent express company since organized, and which took over the business of the former company be held liable, as, in this case, the American Railway Express Company, a war measure. *Friedenwald v. Tobacco Co.*, 117 N. C., 545, cited and distinguished. *Grocery Co. v. Express Co.*, 323.

CORPORATION COMMISSION. See Contracts, 17.

CORRECTION. See Judgments, 11; Appeal and Error, 29.

COSTS. See Appeal and Error, 27.

COUNTERCLAIM. See Contracts, 8; Mortgages, 17; Actions, 1.

COUNTIES. See Constitutional Law, 2, 3, 4, 5, 8, 12, 13, 14, 15, 16, 17, 20, 22; Municipal Corporations, 2, 3; Statutes, 7; Taxation 10.

1. *Counties—Highways—Bridges—Necessary Expense—Vote of People—Constitutional Law.*—The Legislature may authorize adjoining counties to issue bonds in certain proportions for the building of a bridge across a dividing stream, and the validity of the bonds, being for a necessary county expense, does not depend upon their issuance being approved by the vote of the people. *Martin Co. v. Trust Co.*, 26.

2. *Counties— Highways— Bridges— Necessaries— Statutes—Constitutional Law.*—Whether a county is benefited by the building of a bridge and approach over a stream between it and an adjoining county is a question for the Legislature to determine, and not reviewable by the courts. *Ibid.*

3. *Counties— Highways— Bridges —Public Benefits—Taxation—Expense—Statutes—Constitutional Law.*—The construction and maintenance of roads and bridges are of public benefit, the expense of which the

COUNTIES—*Continued.*

Legislature may cast upon the State at large or upon territory specially and immediately benefited, though the work may not be within a part of the total area attached. *Ibid.*

4. *Counties— Highways— Bridges— "Approach"— Taxation—Bonds—Statutes—Constitutional Law.*—Where, by legislative enactment, adjoining counties are authorized to issue bonds to build a bridge over a dividing stream, apportioning the amount thereof each county may issue, and also for the "approach" to the bridge through the swamp lands in one of the counties, the "approach" provided for is to be considered and dealt with as a part of the bridge, in passing upon the constitutionality of the act. *Ibid.*

5. *Counties—Roads and Highways—Taxation—Bonds—Statutes—Requirements—"Callable"—"Optional."*—The requirements of the general statute authorizing a county to issue bonds, etc., for its road purposes, that if the bonds to be issued are "callable" or "optional" it shall so be expressed upon their face, does not apply to bonds not stating such provision upon their face, nor does it apply to bonds issued under a local law applicable to a county which does not contain this restriction. *Comrs. v. Trust Co.*, 171.

6. *Counties—Municipal Corporations—Bonds—Conditions Precedent—Approval of Attorney—Legality—Good Faith.*—Under an agreement between a county board of education and the proposed purchaser of its bonds, that the acceptance should be subject to the approval of the legality of the issue by the latter's attorney, the adverse opinion of the attorney, given in good faith, is a complete defense to a suit by the board to compel the purchaser's acceptance of and payment for the bonds, and in this case it is *Held*, that the reason given by the attorney for his unconditional opinion, that the tax to be levied would not carry the bonds to maturity, and that it must be shown that the required notice of the election had been given, etc., is not subject to the objection that the attorney was passing upon the bonds only as an investment, and not upon their legality, or afford in itself evidence of his bad faith, as a matter of law, in giving his opinion. *Grant v. Board of Education*, 329.

COUNTS. See Criminal Law, 7, 16.

COUNTY COMMISSIONERS. See Schools, 3.

COURTS. See Trials, 1; Jurors, 1; Appeal and Error, 10, 47; Executors and Administrators, 2; Pleadings, 6, 7; Carriers of Goods, 17; Removal of Causes, 3, 6; Indictment, 4; Criminal Law, 5, 8; Bigamy, 1; Contempt, 1; Copyrights, 2; Torrens Law, 2; Statutes, 9; Interstate Commerce, 2; Mortgages, 14; Railroads, 5.

1. *Courts—Recorders' Courts—Jurisdiction—Superior Courts—Contracts—Torts—Waiver—Pleadings—Amendments—New Cause of Action.*—Where an action has been commenced before a recorder's court having concurrent jurisdiction with the Superior Court to the extent of five hundred dollars on contracts and three hundred dollars on torts, the Superior Court may permit the plaintiff to waive the tort and sue upon the contract for an amount within the five hundred dollars

COURTS—*Continued.*

authorized; though the right to do so may be jurisdictional where it appears from the original complaint, liberally construed, as must be done (Rev., sec. 495), that such was the intention of the pleader, and an amendment in the Superior Court, permitting the allegation to be amplified and made more specific, is not objectionable as setting up a new cause of action. *Armfield Co. v. Saleeby*, 298.

2. *Courts—Jurisdiction—Justices of the Peace—Contracts—Torts—Carriers of Goods—Express Companies.*—A shipper by express who has been damaged by an unreasonable delay in the delivery of the goods may bring his action upon contract within the jurisdiction of a justice of the peace, and waive the tort beyond this jurisdiction, or sue in the Superior Court in a larger sum upon the tort. *Pendergraph v. Express Co.*, 345.

3. *Courts — Jurisdiction — Pleadings — Amendments — Highways— Public Roads—Cartways—Appeal and Error—Procedure.*—Township supervisors have authority over petitions to lay out cartways only, without that to lay off highways, the latter being for the county commissioners, and not the former. Hence, where the prayer of the petition for a cartway has been granted by the supervisors, appealed to and affirmed by the county commissioners, and thence goes to the Superior Court, on further appeal, the jurisdiction of the court is derivative from that of the supervisors, and the court, by amendment, cannot extend the jurisdiction by permitting an amendment so as to lay out a highway; and, when this appears to have resulted on appeal to the Supreme Court, the amendment will be stricken out, and the Superior Court will proceed to pass upon the case as presented before the amendment was allowed. *Holmes v. Bullock*, 376.

4. *Courts—Orders—Control of Funds—Banks and Banking—Commissions—Adverse Claims.*—Where the parties to a proceeding in attachment agree that the property be sold, and the proceeds deposited in a certain bank to await the final outcome of the action, and the bank so receives them and sets up an adverse claim, it is sufficient to sustain an order of court on the bank to pay the money to another commissioner appointed by the court. *Mfg. Co. v. Lumber Co.*, 571.

5. *Courts—Opinion upon Facts—Criminal Law—Sentence.*—Where a large quantity of spirituous liquor was found in the possession of two persons, separately indicted under the statute making such possession evidence that it was for the unlawful purpose of sale, a remark of the judge in sentencing one of them, upon his conviction, that he thought both persons accused had been selling and delivering the liquor at a certain town, is not in the contemplation or meaning of Rev., 535, prohibiting the judge from giving an opinion whether a fact is fully or sufficiently proven, on the trial of the other defendant. *S. v. Baldwin*, 687.

6. *Same—Common Law—Strict Construction.*—The restriction on the trial judge that he shall not express his opinion as to whether a fact at issue had been fully or sufficiently proven does not exist at common law, but rests upon statute, Rev., 535, and being in derogation of the common law, the statute cannot be extended beyond the meaning of its terms. *Ibid.*

COURTS—*Continued.*

7. *Courts—Evidence—Withdrawn—Appeal and Error—Error Cured—Instructions.*—Upon the trial of the prisoner for the murder of his father-in-law, with testimony that the wife's parents had prejudiced her against her husband, testimony as to the cordial relationship between the prisoner and his wife is incompetent, the question being as to the feeling of the prisoner towards the deceased, and the admission of this evidence in defendant's behalf would tend to prejudice the jury against the deceased, and was properly excluded. *S. v. Lovelace*, 763.

COURT'S DISCRETION. See Appeal and Error, 29; Pleadings, 11.

CREDITORS. See Torrens Law, 3; Deeds and Conveyances, 19.

CREDITS. See Mortgages, 20; Judgments, 14.

CRIMINAL LAW. See Statutes, 19; Courts, 5; Taxation, 13; Homicide, 3; Intoxicating Liquors, 3, 4; Indictment, 5; Instructions, 14; Larceny, 1, 2; Municipal Corporations, 10; Evidence, 32, 33; Bigamy, 2: Appeal and Error, 53, 55, 58; Bigamy, 1, 2.

1. *Criminal Law — Conspiracy — Common Design — Evidence — Trials.* — Where there is evidence tending to show that the several defendants formed and entered into a common design to commit a theft, the substance of the offense charged in the bill of indictment, the acts and declarations of each in pursuance and in furtherance thereof are competent as to all. *S. v. Stancill*, 683.

2. *Criminal Law— Conspiracy— Common Design— Declarations.*— Where the declarations of one of the defendants as to the theft, for which several were indicted, are incompetent as to another of them, their admission is cured when the one charged with making them afterwards testified that he had done so, it being immaterial to whom he had made them, the fact alone being important, and the order in which the evidence is introduced being within the discretion of the trial judge, when not plainly abused by him. *Ibid.*

3. *Criminal Law—Receiving—Evidence—Guilty Knowledge.*—Upon a trial for receiving stolen goods, etc., the defendant was an overseer of convicts, and a certain trusty was permitted to spend from Saturday nights to Sunday nights away from camp; there was evidence that he stole certain property, *i. e.*, a certain watch, money, etc., and an itemized account of the articles stolen was in a newspaper to which the defendant subscribed, and the articles afterwards were found in the defendant's possession; that the number on the watch was marked out and the hands thereon changed to destroy its identity. The defendant denied knowing that the watch and money had been stolen: *Held*, the evidence was properly admitted as tending to show his guilty knowledge. *S. v. Stancill*, at this term, cited and applied. *S. v. Mincher*, 698.

4. *Criminal Law—Husband and Wife—Abduction—Elopement—Evidence—Virtue of wife.*—Testimony of the husband as to the innocence and virtue of his wife, for abducting or eloping with whom the defendant was indicted under the provisions of Rev., 3360, that she was not a bad woman, he was "wrapt up in her," and that she was an innocent and virtuous woman, that is sufficient to sustain a conviction upon the

CRIMINAL LAW—*Continued.*

question of her innocence and virtue since her marriage; and evidence that the defendant had abandoned his motherless children for the purpose, is competent to show his strong infatuation which induced him to elope with another man's wife. *S. v. O'Higgins*, 708.

5. *Criminal Law—Statutes—Evidence—Witness—Compelling Defendant to Testify—Constitutional Law—Courts—Discretion—Abuse of Discretion.*—Where the male defendant is tried under an indictment of highway robbery of a watch, and the *feme* defendant for being present and taking the watch from the prosecutor's pocket, and the male defendant, during the progress of the trial, proposed to examine his codefendant, against her will, to show that he was not with her on the night in question, and that the watch had been found in the bed occupied by her and the prosecutor: *Held*, construing Rev., 1630, 1634, and 1635 together, the *feme* defendant was not compellable to testify as to the crime charged, under the present indictment, or as to her guilt of the crime of criminal prostitution under the acts of 1919, ch. 215; and while, at times, evidence of this character may be essential to the enforcement of the criminal laws of the State, the trial judge is allowed a large discretion in his rulings to preserve the constitutional rights of the witness, which will not be disturbed unless substantial error is shown; and his ruling in this case, in not compelling the witness to testify, is approved. *S. v. Medley*, 710.

6. *Criminal Law—Lynching—Statutes—Constitutional Law.*—Our statutes, Rev., 3698, to prevent lynchings, making it a felony to conspire to break or enter any jail, etc., for the purpose of killing or injuring any prisoner confined therein, charged with crime or under sentence; and Rev., 3233, also entitled "Lynching," giving an adjoining county jurisdiction over the crime and offender as "full and complete. . . . and to the same extent" as if the crime had been committed therein, are a valid exercise of the legislative powers. *S. v. Rumple*, 717.

7. *Criminal Law—Lynching—Statutes—Indictments—Bad Counts Disregarded.*—An indictment under Rev., 3698, designated to prevent lynching, and brought in an adjoining county under Rev., 3233, charged: (1) a conspiracy to break a prison; (2) breaking and entering the prison with intent, etc.; (3) a riot and disorderly conduct; and (4) defacing and entering a certain building. The first and second counts were good, and, *Held*, if the third and fourth were bad, in not stating an offense under the statute, they may be disregarded, and conviction had on the first and second ones. *Ibid.*

8. *Criminal Law—Lynching—Statutes—Attempt—Courts—Jurisdiction—Adjoining County—Less Offense.*—Under the provisions of Rev., 3269, a defendant, charged in the indictment of a greater criminal offense, may be convicted of the same crime of a less degree, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime; and the trial of an attempt to lynch a prisoner, under Rev., 3698, is not prohibited in the adjoining county under sec. 3233, on the ground that the latter section provides only for the completed offense, sec. 3698 conferring the jurisdiction as full and complete and to the same extent as if the crime had therein been committed. *Ibid.*

CRIMINAL LAW—*Continued.*

9. *Criminal Law—Lynching—Mob—Common Purpose—Evidence—Declarations of Others.*—Where there is evidence that the defendant charged with an attempt at lynching an incarcerated prisoner, Rev., 3298, was of a crowd that had conspired together for the purpose, and actively participated in the common design, the acts and declarations of other members of the crowd relative thereto, are evidence against him; and when such acts and declarations occurred after the dispersal of the crowd by the militia, it does not affect the matter, if they occurred while the mob was actually engaged in preparing to resume their unlawful purpose. *Ibid.*

10. *Criminal Law—Assault upon a Woman—Consent—Kidnapping—Evidence—Statutes.*—Where a man, over eighteen years of age, takes a woman, also over eighteen years of age, in an automobile, away from the home of her relatives, without their knowledge, and in whose care she was living, and knowing that the girl was an imbecile and had not sufficient mind to protect herself, had carnal knowledge of her, it is sufficient for conviction of an assault upon a woman, irrespective of the question of her consent. *Semble*, this would be sufficient for conviction of kidnapping under Rev., 3634, or a greater offense. *S. v. Marks*, 730.

11. *Criminal Law—Evidence—Confessions—Arrest.*—Confessions of a prisoner under arrest for a secret assault upon an officer made to the officer having custody over him, without promises to induce the confession, or threats to extort or coerce it, but voluntarily made, are competent upon the trial. *S. v. Bridges*, 733.

12. *Criminal Law—Secret Assault—Evidence—Statutes.*—The defendant was unlawfully carrying spirituous liquors in an automobile at night, and refused to stop at the command of an officer of the law. Later this officer and another officer went to a certain house to make the arrest, one of the officers going to the front door and the other going to the back, carrying a flash light in one hand and a pistol held downward in the other. He flashed his light, and immediately the prisoner fired a shotgun from the dark portion of the building, inflicting serious injury. Theretofore the prisoner had expressed a determination not to be arrested. The firing was without any warning to the officer, or his knowledge that the prisoner was at the place he fired from, and consequently without time for the officer to make resistance, though instinctively he threw up his hand with the pistol in it in an unsuccessful effort to protect his face: *Held*, sufficient evidence of a secret assault under our statute. Rev., 3621. *Ibid.*

13. *Same—Self-defense—Instructions.*—Upon the evidence in this action for secret assault on an officer, tending to show that the defendant, while being arrested at night, fired from concealment in the dark, without warning, upon the officer making the arrest, an instruction is correct that if the officer did not have a warrant for the arrest, and intentionally and purposely pointed his pistol at the defendant, who under the circumstances reasonably apprehended that he was in danger of great bodily harm or the loss of his life, the jury should find that he had a legal right to use such force as was actually or apparently necessary to repel the attack and protect himself, etc. *Ibid.*

CRIMINAL LAW—*Continued.*

14. *Criminal Law—Arson—Accessory—Trials—Principal Felon—Statutes.*—One count in a bill of indictment charged the defendant with arson, and another thereof as accessory before the fact in procuring a certain other person to commit the crime, such other person being under separate indictment for arson and awaiting trial at the time of the trial of the present defendant. At the present trial the solicitor consented to a verdict of not guilty under the first count, and defendant was convicted as an accessory before the fact under the second one: *Held*, objection that the alleged principal felon had not then been tried or called upon to plead, is untenable under the provisions of our statute, Rev., 3287. *S. v. Reid*, 745.

15. *Criminal Law—Evidence—Hearsay—Husband and Wife—Statutes—Appeal and Error—Reversible Error.*—Upon the trial of the defendant for accessory before the fact for arson, there being evidence that the defendant paid the alleged principal felon money to procure him to commit the crime, testimony of the defendant brought out on his cross-examination, and under his exception, that the wife of the alleged principal felon sent the prisoner word through the prisoner's wife, not to speak of the transaction, as it would not be good for him, is hearsay, and further incompetent under Rev., 1634 and 1635, forbidding the wife to testify in such instances to her husband's hurt, when not made in his presence or by his authority; and the admission of such testimony is prejudicial and reversible error. *Ibid.*

16. *Criminal Law—Indictment—Counts—Verdict—Appeal and Error—New Trial.*—A general verdict of guilty upon several counts of an indictment will apply to each count, and when error has been committed as to some, the verdict will stand as to the others, and a new trial will not be granted. *S. v. Coleman*, 758.

17. *Criminal Law—Instructions—Evidence—Appeal and Error—Reversible Error.*—An instruction upon a criminal trial that if the contentions of the defendant satisfied the jury beyond a reasonable doubt, to render a verdict of acquittal is erroneous, the defendant having a right to an acquittal if they find in his favor upon all the evidence, that of the State, as well. *S. v. Kirkland*, 810.

18. *Criminal Law—Burnings—Evidence—Nonsuit—Questions for Jury—Trials.*—Evidence in this case tending to show that one of the defendants owed the prosecuting witness money for hauling and delivering lumber, which he paid only in part; that he had deceived the witness as to the amount he owed, and being pressed for payment, suggested leaving the worst lumber, having it insured, setting fire thereto, and collecting the insurance money; that he thereafter actually had the lumber insured for himself; a fire occurred, his codefendant, in his employ, was seen near the place of the fire just before it occurred, acting in a suspicious manner, and that both were tracked from the scene of the fire by a bloodhound, etc., with the other evidence in the case, is *Held* sufficient, upon a motion of nonsuit, for the determination of the jury, upon the guilt of both defendants of setting fire to and burning the lumber. *S. v. Yearwood*, 813.

19. *Criminal Law—Evidence—Bloodhounds.*—Where there is evidence that the defendant, indicted for setting fire to and burning lumber, was

CRIMINAL LAW—*Continued.*

seen at the place of the crime by a witness, and that he left the place in a suspicious manner, taking a devious route in the direction of his home, going around the ends of logs instead of jumping over them, etc., in corroboration and as a further circumstance tending to convict the defendant of the crime, testimony is competent that the witness put a bloodhound on tracks corresponding with those of the prisoner at the place of the burning, where he had been seen, and that the hound followed the devious route that the witness had taken until it had trailed the prisoner to the bed it was shown he had slept in the night before; and that the witness had many times tested the bloodhound in trailing human beings on other occasions, and had found it accurate. *Ibid.*

20. *Criminal Law—Alibi—Evidence—Circumstance to Show Guilt.*—Where the mother of the prisoner had told the prosecuting witness, in his presence, that the prisoner had been in bed for a period embracing the time the offense had been committed for which he was being tried, and the prisoner had assented, it will be taken that she was endeavoring to set up an alibi for him, and it is competent to introduce evidence in contradiction as a circumstance tending to show his guilt. *Ibid.*

21. *Criminal Law—Evidence—Accomplice.*—One charged with the commission of a crime may be convicted upon the direct testimony of his accomplice therein if fully believed by the jury to be true. *S. v. Palmer*, 822.

CROPS. See Mortgages, 1.

DAMAGES. See Contracts, 2, 3, 6, 11, 12, 13, 15, 22, 23, 24; Judgments, 8, 9; Vendor and Purchaser, 1; Statutes, 5; Carriers of Goods, 4, 7, 8, 9, 10, 18, 19, 20; Instructions, 3; Railroads, 3; Evidence, 10, 11, 12, 25, 26; Corporations, 1; Schools, 4; Carriers of Passengers, 1, 3; Municipal Corporations, 7; Appeal and Error, 30; Telegraphs, 5; Physicians and Surgeons, 1; Employer and Employee, 8; Limitations of Actions, 5.

1. *Damages—Personal Injury—Trespass—Evidence—Expectancy of Life.* Where there is evidence that a permanent physical injury resulted from a forcible trespass, the expectancy of life of the injured party may be considered upon the question of damages. *Kirkpatrick v. Crutchfield*, 348.

2. *Damages—Personal Injury—Permanent Damages.*—Where a personal injury has been wrongfully inflicted, of a permanent character, the measure of damages is the reasonable present value of the diminution of the earning capacity. *Ibid.*

3. *Damages—Negligent Killing—Expectancy of Life—Net Worth—Negligence.*—The measure of damages for negligently causing a death is the present pecuniary worth of the deceased, ascertained by deducting the cost of his own living and expenditures from the gross income based upon his life expectancy, his prospects in life, his habits, character, industry and skill, the means he had of making money, the business in which he was employed, so as to ascertain his reasonable net income had not death ensued, and to arrive at his pecuniary worth to his family. *Poe v. R. R.*, 141 N. C., 525, where the court read to the jury the annuity tables, cited and distinguished. *Comer v. Winston-Salem*, 383.

DAMAGES—*Continued.*

4. *Damages—Permanent Improvements.*—Where on the issue for damages the question of permanent improvements enters, such question is a mixed one of law and fact, depending largely upon the circumstances of each case. *Pritchard v. Williams*, 444.

5. *Same—Matters of Law—Questions of Fact—Instructions.—Trials.*—Where, on the question of damages, permanent improvements are properly considered, the measure of compensation is the actual enhancement in the value of the lands by reason of the improvements made thereon. *Ibid.*

6. *Damages—Contracts—Instructions—Appeal and Error—Prejudicial Error—Deductions—Verdict.*—Where a contract for the sale of rails and fastenings was for the agreed price as they laid fastened to a railroad bed, it is reversible error, to defendant's prejudice, for the trial judge to charge the jury upon the measure of damages, that it would be the difference between the price at which defendant contracted to sell them and the fair market value f. o. b. at a certain station at the time of the defendant's breach, the correct rule being that it is such value at the time and place fixed by the contract for delivery, in this case, as they lay fastened in the roadbed: *Held, further*, that *Rhyne v. Rhyne*, 151 N. C., 401, as to deduction for services rendered, did not apply, it appearing from the verdict that the deduction had been made by them without regard to the charge. *Hunter v. Gerson*, 485.

DANGEROUS APPLIANCES. See Employer and Employee, 1, 5, 10.

DEBTOR AND CREDITOR. See Husband and Wife, 3; Contracts, 16; Principal and Surety, 1.

DECEASED PERSONS. See Statutes, 1; Trusts, 1, 2; Evidence, 13, 15, 22.

DECLARATIONS. See Taxation, 2; Boundaries, 1; Copyrights, 1; Principal and Agent, 4, 5; Criminal Law, 2.

DEEDS AND CONVEYANCES. See Constitutional Law, 1, 18; Drainage Districts, 1; Contracts, 1, 5; Injunction, 2, 3; Appeal and Error, 8; Evidence, 5, 8; Mortgages, 5, 6, 7, 8; Husband and Wife, 8; Parties, 1; Estates, 1, 3; Pleadings, 4, 5, 10; Trusts, 7; Torrens Law, 5; Taxation, 2, 5, 6, 7; Tenants in Common, 2; Boundaries, 1; Wills, 12, 17, 24.

1. *Deeds and Conveyances—Equity—Correction—Trusts—Mortgages—Evidence.*—A deed absolute upon its face may not be declared a mortgage by the courts in the absence of allegation and proof that the redemption clause had been omitted by mistake or that it had been induced by fraud and under advantage taken; and where the grantor was competent to fully understand the instrument, had kept it a week before signing, though spoken of in the letter of transmittal as a deed in trust "as per agreement," he is bound by his deed, and his testimony that the grantee and himself had agreed that it should be given to secure a loan, is insufficient to convert it into a mortgage. *Newbern v. Newbern*, 3.

2. *Deeds and Conveyances—Lands—Adjoining Owners—Divisional Line—Establishment—Estoppel—Boundaries.*—When two tenants in common

DEEDS AND CONVEYANCES—*Continued.*

have a divisional line run by a surveyor and go upon the land with him and run and establish this line with the intent of making their deeds to hold the land in severalty, and so make the deed and deal with the land as their own with reference to this line, the boundary so established will estop either of them from claiming a different one as being in accordance with their deeds.—*Dudley v. Jeffress,* 111.

3. *Same—Privies—Purchasers—Knowledge.*—Where the original owners of land are estopped to claim, according to their deeds, a different dividing line from the one they have established as dividing their adjoining lands, their grantees are in privity with them and likewise estopped when they acquire the lands with knowledge of the line so established. *Ibid.*

4. *Deeds and Conveyances—Timber Deeds—Period for Cutting—Reservations—Payments—Owner.*—A grantor of timber standing upon his land specified in his deed that the period for cutting and removing the timber should be five years, provided the grantee, after the expiration of three years, pay to the grantor or the then owner of the land 6 per cent annually in advance upon the purchase price for the privilege of the remaining two years: *Held,* the title to the timber passed to the grantee for the five-year period, with the privilege of cutting and removing it any time within the first three years, free of further charge, and for the last two years, the privilege to be paid for each year in advance, in the amount and in the manner specified in the contract; and when this has accordingly been done, and the grantor of the timber has conveyed the land by deed expressly providing that he reserved the timber rights until a specified time, naming the date upon which the furthest period for cutting and removing the timber expired, under this reservation he retains the right to receive the amount the grantee of the timber paid under the contract though not the owner of the title to the land, as distinguished from the timber, at that time. *Ricks v. McPherson,* 154.

5. *Deeds and Conveyances — Timber Deeds — Interpretation.* — Where a grantor in a timber deed has since sold the lands upon which it was growing to another, reserving the timber for the period of time remaining in which it may be cut and removed, and a party to the action claims title to the lands through him, directly or through *mesne* conveyance, the deeds in the chain of title to the lands and those to the timber having the same reservation, will be construed together as a whole to ascertain the intent of the parties. *Ibid.*

6. *Deeds and Conveyances—Timber Deeds—"Lands"—Separately Conveyed—Distinct Title.*—Timber growing upon land is held and considered to be realty or a part of the land, which may either be separately conveyed or title thereto reserved in the grantor, and where the timber has been sold to be cut, etc., within a certain period, with future payments for the continuance of the privilege to be made to the grantor or "the then owner" of the lands, who since making the timber deed has conveyed the title to the lands upon which the timber was growing, but reserving the title in the timber for the extension period under the timber deed, the position may not be maintained that as he was not "the then owner" he was not entitled to the future payments under the timber contract. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

7. *Deeds and Conveyances—Estoppel in Pais.*—Where the owner of lands has sold them subject to his rights under a former conveyance of the timber to receive the payments for its cutting, etc., and such appears upon the face of the conveyance, he is not estopped *in pais* to assert such rights against his grantee of the lands or a purchaser from him. *Ibid.*

8. *Deeds and Conveyances—Timber—Real Estate—Cutting Period—Defeasible Fee.*—Timber standing and growing upon lands is realty, and subject to the same laws of devolution and transfer; and deeds to such timber, stating a period of time in which the timber may be cut and removed by the grantee, conveys an estate of absolute ownership accordingly, defeasible as to all timber conveyed which has not been cut and removed within the specified time. *Morton v. Lumber Co.*, 163.

9. *Same—Extension—Option—Interest—Contracts.*—Stipulations in a deed conveying timber standing and growing upon lands for the cutting and removing of the timber beyond the period stated therefor in the conveyance, upon the payment of an agreed sum or price, are in the nature of options and do not in themselves create any interest in the timber, but amount only to an offer to create such interest when the conditions are performed, working a forfeiture when not strictly complied with. *Ibid.*

10. *Same—Descent and Distribution—Heirs at Law—Payments.*—The title to timber standing and growing upon lands descends at the owner's death to his heirs at law, and where he had conveyed the timber his heirs at law are entitled to the payment required of the grantee for an extension of the time allowed him for cutting and removing the timber beyond the original period stated in the conveyance, and when such payment has not either been made or tendered in the time stipulated for, the grantee loses all the rights he would otherwise have had under the terms of his deed. *Ibid.*

11. *Same—Widow—Dower.*—Where it appears that the husband was the owner of the lands, and his wife has joined in the conveyance of the timber thereon, and is named as one of the parties of the first part in granting clauses, this, *prima facie*, should only serve to pass her rights appertaining to her as the wife of the owner, and a payment by the grantee for the privilege of an extension of the right to cut, etc., the timber beyond the original period named, after the death of the owner, should be made to the heirs at law to be enforceable, and not to his widow, specially before the allotment of her dower has been made. *Ibid.*

12. *Deeds and Conveyances—Timber—Option—Payment—Deceased Owner—Heirs—Receipt—Guardian.*—Where a grantee of timber relies upon a payment of the stipulated amount to acquire an extension of the period for cutting and removing the timber, made after the death of the owner, to the guardian or his minor children, his heirs at law, it is necessary for the sufficiency of such payment that proper proceedings shall have been had under the statutes, Rev., secs. 1800, 1798, 1788, and 1789, which require the supervision of the court, in a prescribed way, for the disposition by the guardian of his wards' estate, and a

DEEDS AND CONVEYANCES—*Continued.*

payment or tender made to the guardian otherwise is ineffectual. *Ibid.*

13. *Deeds and Conveyances—Fraud—Undue Influence.*—While it is not required that the grantor in a deed, sought to be set aside for fraud or undue influence, exercised by the grantee in inducing its execution, should have been a lunatic at the time, equity will grant relief if he has been so weakened by old age, in mind and body, as not to be able to resist the grantee's imposition or excessive importunity, if it be further shown that the grantor has been actually imposed upon by the use of either of these means, by the stronger mind of the one using them, who stood in the confidential relation of a friendly adviser, in whom sole and implicit reliance in the matter had been placed by the grantee, though weakness of the grantor's mind or inadequate consideration will not, alone, be sufficient. *Dixon v. Green*, 206.

14. *Same—Pleadings—Issue—Demurrer—Appeal and Error.*—The refusal of the court to submit an issue as to undue influence in the procurement of a deed, the grantor seeks to set aside upon the ground that it has not been sufficiently pleaded, has the effect of a demurrer to the sufficiency of the allegations thereof, and they will be assumed to be true on appeal. *Ibid.*

15. *Deeds and Conveyances—Undue Influence—Fraud.*—Undue influence in the procurement of a deed is not always, though frequently, fraudulent, and such influence exists where the will of the person having the stronger mind is substituted for that of him who has the weaker one; and where such influence is paramount and used for the benefit or advantage of the one exercising it, or for a selfish purpose, as is alleged in this case, and the deed has accordingly been executed to him, the law regards it as fraudulent. *Ibid.*

16. *Deeds and Conveyances—Descriptions—Mistakes—Boundaries—Correction—Equity.*—A description of land in a deed making the beginning point on the eastern side of a certain side of a city street will be read to meet the intended description, as beginning on the western side of the street, when it refers to a plat by which it is evident that to place such beginning as designated would take a part of the street into the lot, and by placing it on the western side it would fit the description of the deed except as to this point, and the map of the lot referred to by block and number. *Hayden v. Hayden*, 259.

17. *Same—Maps—Inconsistent Descriptions.*—Where a deed contains two descriptions of the lands, one by metes and bounds, and the other by lot and block, according to a certain plat or map, the controlling description is the lot according to the plat or map. *Ibid.*

18. *Deeds and Conveyances—Wills—Trusts—Substituted Trustee—Color—Adverse Possession—Limitation of Actions.*—A deed made by a trustee substituted by order of court for one named in a will, with power of sale, is color of title which will ripen into an absolute one by sufficient adverse possession for the statutory periods, there being no infants interested, the suspension of the statute as to married women having been repealed. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

19. *Deeds and Conveyances—Creditors—Fraud—Husband and Wife.*—A deed of lands from a husband to his wife, when fraudulent, will be set aside as against the rights of creditors, when it is made to appear that it was without consideration, or that she participated in the fraudulent intent of her husband, or had notice thereof. *Bank v. Park*, 389.

20. *Deeds and Conveyances—Probate—Husband and Wife—Private Examination—Contracts to Convey—Bond for Title—Adverse Possession—Limitation of Actions.*—A contract to convey the wife's land, joined in by her husband, but without probate and the privy examination of the wife, is void, and the possession of the grantee thereunder is not hostile to the wife's interest or title to the lands, and will not ripen his title by seven years adverse possession, without evidence to show payment of the purchase money or of any act or conduct on his part hostile to the wife's title. *Hinson v. Kerr*, 537.

21. *Deeds and Conveyances—Probate—Judicial Sales—Title—Equity.*—Objection to the probate and registration of a deed made under order of court, that therein the commissioners to sell were not sufficiently identified, the defect may be cured by a later probate of the clerk of the Superior Court; and where the record of the proceedings identify the commissioners, the purchaser acquires an equitable title, which he may enforce in his action. *Hutton v. Horton*, 549.

22. *Deeds and Conveyances—Purchaser by Acre—Shortage of Acreage—Actions—Warranty of Title—Warranty of Acreage.*—Where a conveyance is made of a certain number of acres of land at a specified price per acre, based upon an honest miscalculation of the parties from a map, and it is ascertained after the conveyance had been made that the purchaser obtained a much less number of acres than he had paid for, he may maintain his action to recover against his grantor the difference in the number of acres between that paid for and received, as on a breach of contract; and, also, under a breach of warranty of title, the price of the acreage he had paid for and to which his grantor had no title. The principle upon which the grantee may not recover for a deficiency in acreage recited in a deed conveying a definite or described tract of land, without warranty as to the acreage, is distinguished. *Henofer v. Realty Co.*, 584.

23. *Deeds and Conveyances—Delivery—Intent—Registration—Evidence—Instructions—Verdict Directing.*—The registration of a deed to land is only presumptive evidence of delivery, and where the evidence tends only to show that the intent of the grantor was not to have it delivered until after her death, but had sent it to be registered and received it again, and had kept it continuously in her possession without delivering it, actually or constructively, a charge to the jury is correct, that if the jury found the facts according to the evidence, there was not a legal delivery of the deed and no title passed thereunder. *McMahan v. Hensley*, 587.

24. *Deeds and Conveyances—Descriptions—Reference to Other Instruments—Wills.*—Where a deed or instrument conveying land refers to another for description, the principal deed should be considered and

DEEDS AND CONVEYANCES—*Continued.*

construed as if the description referred to was written out therein in full. *Williams v. Bailey*, 630.

25. *Deeds and Conveyances—Wills—Ambiguous Descriptions—Definite Descriptions.*—An unambiguous and certain description of land in a deed will control one therein which is indefinite and uncertain. *Ibid.*

26. *Same.*—A testator devised his "Bat Allen place" to his sister, giving the number of acres, and referred to a deed from said Allen giving description by known and visible lines and boundaries, containing the number of acres specified, and excepted therefrom "that portion heretofore sold to John Allen." It was admitted or clearly established that the land thus excepted was from an adjoining tract of land acquired by the testator from Bat Allen, and sometimes known as the Tomlinson tract: *Held*, the land intended to be devised by the testator is that included in the boundaries of the deed referred to and not otherwise, and evidence tending to show that both of these tracts were included in the "Bat Allen place" was properly excluded. *Ibid.*

DEFAULT. See Judgments, 3, 6, 9.

DELIVERY. See Carriers of Goods, 18; Telegraphs, 4; Vendor and Purchaser, 2; Deeds and Conveyances, 23; Assumpsit, 1.

DEMURRER. See Deeds and Conveyances, 14; Pleadings, 6; Slander, 1; Appeal and Error, 39.

DEPOSITIONS. See Evidence, 20.

DEPOSITS. See Banks and Banking, 1.

DESCENT AND DISTRIBUTION. See Deeds and Conveyances, 10.

1. *Descent and Distribution—Heirs at Law—Presumptions—Instructions—Appeal and Error—Reversible Error.*—The law presumes that the estate of a deceased person descends to his heirs at law upon his death, and an instruction that the burden of proof is on them to show intestacy is reversible error. *Barham v. Holland*, 104.

2. *Descent and Distribution—Heirs—Title—Possession—Dower.*—The possession and the right thereto of the lands of a deceased owner, dying intestate, is in his heirs at law, before the dower of his widow has been allotted therein. *Morton v. Lumber Co.*, 164.

3. *Descent and Distribution—Personal Property—Half Blood—English Law—Statutes.*—Our statute on the subject of the distribution of personal property is substantially similar to the English law on the subject, and it is held, in conformity with the English decisions thereon, that the distribution of personal property among the collateral relations of the deceased ancestor is equal among those of his whole and half blood. *In re Skinner*, 442.

DESCRIPTIONS. See Evidence, 8, 9; Deeds and Conveyances, 24, 25.

DEVICES. See Lotteries, 2.

DEVISEES. See Mortgages, 3, 4; Wills, 22.

DIRECTOR OF RAILROADS. See Carriers of Goods, 16; Removal of Causes, 2, 4.

DIRECTORY. See Statutes, 6.

DISCOVERY. See Limitation of Actions, 7.

DISCRETION. See Pleadings, 6; Schools, 3; Municipal Corporations, 3; Statutes, 9; Appeal and Error, 47; Removal of Causes, 6; Criminal Law, 5.

DISTRIBUTION. See Constitutional Law, 10.

DIVORCE.

Divorce—Action—Injured Party—Statutes.—The consolidated statutes, ch. 238, sec. 8, Public Laws of 1919, requires, for the dissolution of marriages, that the application for divorce must be on the application of the injured party, on the several grounds enumerated, one of them (subsec. 5) in case of separation and living apart of the husband and wife for ten successive years, the plaintiff residing in this State for that period; and where the husband sues for a divorce and it is established that his cruel and inhuman treatment had caused the separation, he is not the injured party and may not take advantage of his own wrong by obtaining a decree of divorce. *Sanderson v. Sanderson*, 339.

DOWER. See Deeds and Conveyances, 11; Descent and Distribution, 2.

DRAINS. See Municipal Corporations, 7.

DRAINAGE DISTRICTS.

1. *Drainage Districts—Statutes—Assessments—Incumbrances—Warranty—Deeds and Conveyances—Mortgages.*—The assessments upon lands in a drainage district, formed under the statute, ch. 442, Laws 1909, and amended by ch. 67, Laws 1911, are a lien *in rem* on the lands of the owner, for the payment of the bonds issued by the district in accordance with the statute, the district being a geographical *quasi*-public corporation, and the benefits annually accruing to the advantage of successive owners, such assessments are due and payable at stated intervals, but are not the personal obligation of the owner until they are due, nor until they fall due, an encumbrance within the intent and meaning of a warranty in a deed. *Pate v. Banks*, 139.

2. *Drainage Districts—Assessments—Notice—Statutes—Nonresidents.*—The purchaser of lands within a drainage district formed under the provisions of ch. 442, Laws 1909, as amended by ch. 67, Laws 1911, is fixed by the statute with notice of the assessments and the time thereof, whether a resident of another State or not. *Ibid.*

3. *Drainage Districts—Preliminary Work—Mortgages—Liens—Priorities—Parties—Judgment—Estoppel.*—Where a drainage district, incorporated under chapter 442, Laws 1909, and amendments, has accepted the preliminary work done by another corporation, including surveys, excavations, etc., and it has been recommended by the viewers, in their final report, that this work be availed of by the district, and that compensation therefor be made, and the report confirmed by order of court, though the corporation doing this preliminary work has made

DRAINAGE DISTRICTS—*Continued.*

no prior claim upon the viewers, and no damages have been assessed to compensate them, but the work has been found necessary and the amount reasonable, or a saving to the district, the judgment does not estop the corporation, the plaintiff in the action, from now presenting its claim for such compensation, but a decree that it shall be paid, and the drainage commissioners are within their authority to include the same within the amount necessary to complete the work; and this will not impair or affect the amount of bonds to be issued for its completion; and it is *Held,* that the bonds so issued will have precedence over mortgage and all other liens except taxes due or to become due, whether such lienors have been made parties or not. *Farms Co. v. Comrs.,* 661.

DYING DECLARATIONS. See Homicide, 7.

EASEMENTS. See Telegraphs, 6.

EDUCATION. See Statutes, 2; Libel and Slander, 1.

ELECTIONS. See Constitutional Law, 19, 24; Municipal Corporations, 8; Statutes, 17.

1. *Elections—Fraud—Municipal Corporations—Cities and Towns—Sales—Public Utilities—Injunctions—Contracts.*—Where the municipal authorities had agreed to sell one of the public utilities of the city, subject to the approval of the vote of its electors, and thereupon a suit to restrain the election is instituted, alleging fraud in the contract, and thereafter the question is approved by the voters: *Held,* the allegations of fraud cannot be maintained, for at that time the proposed contract had not been entered into, and the making of the contract thereafter upon the approval of the voters cannot affect the matter, as it would make the action a new one. *Allen v. Reidsville,* 513.

2. *Elections—Ballots—Related Questions—Municipal Corporations—Cities and Towns—Public Utilities—Sales—Franchise.*—The question of a sale of a public utility to a certain corporation, and the granting to it of a franchise necessary to its continued operation, if submitted upon one ballot, are questions closely related to each other, and the ballot would not be objectionable on the ground that a vote thereon would deprive the voter of his choice as to one of the propositions. In this action it is admitted that only the one proposition as to the sale was submitted. *Ibid.*

ELECTRICITY. See Employer and Employee, 1, 2.

ELOPEMENT. See Husband and Wife, 9; Criminal Law, 4.

EMBARGO. See Contracts, 10.

EMBEZZLEMENT. See Libel and Slander, 3.

EMPLOYER AND EMPLOYEE. See Evidence, 2; Railroads, 4; Instructions, 10.

1. *Employer and Employee—Master and Servant—Electricity—Dangerous Instrumentalities—Appliances—Duty of Master—Delegation of Duty—Contracts.*—An employer may not contract with his employee to do

EMPLOYER AND EMPLOYEE—*Continued.*

dangerous work, such as lineman for an electrical power plant, the latter to furnish his own tools and appliances, and thus avoid his duty to furnish his employee with proper ones for the purpose, such being in effect to permit him to contract against his own negligence. *Clements v. Power Co.*, 52.

2. *Employer and Employee—Master and Servant—Contributory Negligence—Assumption of Risks—Electricity—Evidence—Verdict.*—Where, upon issues of contributory negligence and assumption of risks, in an action to recover of the intestate's employer for his alleged killing while engaged in his duties as a lineman for an electric power plant, there is evidence tending to show that the intestate was a lineman of long experience, and was killed while replacing a cross-arm in his own way near the top of a pole, preferably using his own leather gloves, considered unsafe for the purpose, while rubber gloves were considered safe; and knowing the danger, permitted two wires, highly charged, to come in close proximity with each other, which he could have readily avoided by another and available method, and the shock that caused his death was through the hand, with the leather gloves on, being in contact with one of these wires: *Held*, sufficient to sustain an adverse verdict to the plaintiff, and under a charge free from error the verdict will be sustained on appeal. *Ibid.*

3. *Employer and Employee—Master and Servant—Duty of Master—Tools and Appliances—Defective Tools—Negligence.*—In order to recover damages for a personal injury resulting to an employee in using simple, every-day tools upon allegation that the employer had failed to furnish him proper tools and appliances for the work the former was required to do in the course of his employment, it must be shown, among other things, that the injury resulted from a lack of such proper tools, or by reason of defects therein, which the employer is required to remedy, in the proper and reasonable discharge of his duties, and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur. *Winborne v. Cooperage Co.*, 88.

4. *Same—Evidence—Nonsuit—Trials.*—The plaintiff was employed by the defendant to take down old boxcars to save the iron therein, frequently requiring cutting the iron bolts from the rods, the plaintiff at first using his own tools, but to do the work faster required other tools, and an assistant, which was granted, the tools being supplied by a hardware store, upon defendant's order, of plaintiff's own selection. At the time of the injury the plaintiff directed his assistant to strike a cold chisel he was holding, with the poll of an ax belonging to the company, not enumerated by him in the list of tools he required, but found by him near the place and which he had used for several days without examining it, and the ax flew off the helve, causing the injury complained of to the plaintiff's foot: *Held*, insufficient evidence that the defendant had failed in his duty to furnish the plaintiff with proper tools and appliances, etc., and a motion for judgment as of nonsuit should have been granted: *Held further*, that the plaintiff's testimony, when recalled, to the effect generally that he had asked for more tools and could not get them, when considered in connection

EMPLOYER AND EMPLOYEE—*Continued.*

with his former entire statement and evidence, showing specifically that he had the tools sufficient and proper for the work, will not affect the result. *Ibid.*

5. *Employer and Employee—Master and Servant—Carriers of Goods—Railroads—Express Companies—Negligence—Concurring Negligence—Evidence—Nonsuit—Trials.*—The defendant express company hired among the bystanders, including the plaintiff's intestate, men to help put a shafting, weighing about 2,000 pounds, from its trucks into its express car. There was evidence tending to show that the trucks were properly placed at first with reference to the car door, and when the men were in the act of placing the front end of the shafting in the car door the codefendant railroad company suddenly started the train, moving it about thirty feet, making it necessary to change the direction of the shafting. The trucks could not be placed at right angles, the proper position, because of express packages there, and while loading in this position the end of the shafting slipped from the truck and caused the death of the intestate; that had the trucks been at right angles to the car door, as formerly, the injury would not have been inflicted, and that in the then position of the trucks insufficient help was furnished for the safe loading of the shafting: *Held,* error to exclude testimony of one of long experience in such work as to the danger of loading the shaft under the changed conditions; that the one holding the handle of a truck was agent of the express company; that its station agent was present, their negligence, if any, being that of defendant express company, as also the answer of a witness to a question to state from what he saw the cause of the dropping of the shaft from the truck; and further, *held,* under this and the other testimony, sufficient for the jury upon the question of defendant express company's failing to use reasonable care; concurrent negligence of defendant railroad in moving its train under the circumstances, contributing to the death of the intestate, and the negligent failure of defendant express company in failing to furnish sufficient and experienced help. *Barnes v. R. R.*, 264.

6. *Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Dangerous Appliances—Instructions—Contributory Negligence—Trials—Motions—Nonsuit.*—In an action by an employee in a silk factory to recover damages for a personal injury alleged to have been caused by the negligence of the defendant in leaving one of its motors, attached to a machine, uncovered, so as to expose its revolving cogs, in which the plaintiff's dress caught and inflicted the injury complained of, there was evidence tending to show that the plaintiff, in the performance of her duty, was required to go along the aisles separating the machines and around the motors at the end thereof; that she was not told that the cover had been removed by the defendant from this particular motor, and was unaware of it, and in going for a companion at supper time, as was her custom, the exposed cogs caught her dress and inflicted the injury without fault on her part: *Held,* sufficient to take the case to the jury on the issue of defendant's negligence in not furnishing her with a safe place to work, and defendant's motion to nonsuit was properly denied, as also a prayer for instruction that the plaintiff could not recover on the ground that she should have avoided the injury by keeping away from that particular motor. *Gordon v. Silks Corp.*, 470.

EMPLOYER AND EMPLOYEE—*Continued.*

7. *Employer and Employee—Master and Servant—Negligence—Evidence—Trials.*—Evidence tending to show that the plaintiff, having had long experience and skill in the particular work, was left to his own methods in cutting out timber from lands, and had cut the branches from a felled tree for its more convenient placing when it rolled upon his foot, causing the injury complained of, is insufficient upon the question of the defendant's actionable negligence; nor will this principle be affected by reason of an order of his superior employee to roll this particular tree down a hill for convenient removal when it does not appear that the hazard was thereby increased or that any serious injury was likely to result therefrom. *Rumbley v. R. R.*, 153 N. C., 457, cited, approved, and applied. *Angel v. Spruce Co.*, 621.

8. *Employee and Employee—Master and Servant—Principal and Agent—Physicians and Surgeons—Negligence—Damages—Questions for Jury—Evidence—Trials.*—Evidence tending to show that a corporation, with previous knowledge of the incompetency or unskillfulness of a physician selected by it to attend and treat the plaintiff for an injury received in its employ, and that the plaintiff and other employees paid the defendant, under a certain plan, certain fees or amounts of money for the purpose of paying the physician's salary is sufficient for the consideration of the jury as to the recovery of damages to plaintiff caused by the lack of proper skill of the physician it had thus selected. *Ibid.*

9. *Employer and Employee—Master and Servant—Safe Place to Work—Inspection.*—The employee does not assume the risk of dangers as being inherent in the class of services he is to perform when the injury received by him was caused by the negligence of his employer in performing his duty to furnish a reasonably safe place to work, of which dangers the employer knew, or should have known by reasonable inspection, and of which the employee was unaware, and was not reasonably presumed to have known. *Buchanan v. Furnace Co.*, 643.

10. *Same—Negligence—Master's Relative Duty—Dangerous Employment—Assumption of Risks—Evidence—Questions for Jury—Trials.*—The duty owed by the owner of a mine to his employee, a "mucker," working in a tunnel thereof, to furnish him a reasonably safe place to work and to keep it so by proper inspection, is a primary one; and where, under the rules of a mine, such employee was not permitted to enter the tunnel after a blast, until it had been inspected and "scaled," to prevent injuries from rocks jarred by the explosion and likely to fall, and there was evidence that either during the inspection, or thereafter, the defendant, and others under the direction of vice principals, entered the tunnel, and was injured by a falling rock, the danger of which had immediately been discovered by another employee who had been sent for a torch; and there was conflicting evidence as to whether such employee was warned or heard the warning given of the danger, not to him but to others, or went forward with his work upon being instructed to do so, and received the injury in consequence: *Held*, sufficient evidence for the determination of the jury upon question of the defendant's actionable negligence, and also as to the employee's assumption of risk, and was properly submitted to the jury instead of being decided as a matter of law. *Ibid.*

EMPLOYER AND EMPLOYEE—*Continued.*

11. *Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Nondelegable Duty.*—The employer may not delegate to another his duty to furnish his employee with a reasonably safe place to work and to maintain it so by reasonable inspection, and escape liability for an injury caused his employee by neglect of this duty by the person acting for him. *Ibid.*

EMPLOYMENT. See Statutes, 5; Schools, 4.

ENTERER. See State's Lands, 1.

ENTRY. See Evidence.

Entry—Navigable Waters—Riparian Owners—Wharfage—Statutes.—Navigable water is not subject to entry (Rev., sec. 1693) except by the riparian owner for wharfage purposes. Rev., sec. 1696. *Barfoot v. Willis*, 200.

EQUALITY. See Taxation, 9; Principal and Surety, 1.

EQUALIZATION. See Constitutional Law, 25.

EQUITY. See Actions, 3; Deeds and Conveyances, 1, 16, 21; Options, 1; Injunctions, 2; Limitation of Actions, 4; Materialmen, 4; Contracts, 18, 21.

1. *Equity—Estoppel—Carriers of Goods—Freight Charges—Banks and Banking.*—Where a mortgageee bank takes a draft, bill of lading attached, the latter marked "freight prepaid," for collection, and afterwards makes settlement with its mortgagor, from the proceeds, with a sufficient surplus to pay the freight, relying upon the carrier's statement in the bill of lading, and without knowledge that it was not true, the carrier by its silence is estopped in equity to hold the bank responsible for the freight charges. *R. R. v. Simpkins*, 274.

2. *Equity—Mutual Mistake—Accounts—Settlement—Quantum of Proof—Rescission and Cancellation—Evidence—Burden of Proof.*—Where a settlement of a monetary demand is sought to be set aside, in equity, by the creditor as insufficient, on the ground of mutual mistake of the parties, it requires the plaintiff to show the mistake that would vitiate the settlement by the preponderance of the evidence; but to correct and enforce an instrument as corrected requires the evidence to be clear, cogent, and convincing, for it calls upon the chancellor to exercise a much greater degree of power. *Long v. Guaranty Co.*, 503.

3. *Equity—Account—Settlement—Mutual Mistake—Cancellation.*—Where a debtor has obtained a receipt in full from his creditor, upon payment of a less sum than was due him, by mutual mistake induced by the creditor's, or his agent's, misrepresentation, intentional or otherwise, a correction of the written receipt will not afford adequate relief, and equity may cancel the instrument and restore the parties to their original rights. *Ibid.*

ESTATES. See Husband and Wife, 4, 6; Wills, 2, 3, 5, 7, 13, 19, 24; Estoppel, 2; Actions, 2, 3; Pleadings, 8.

1. *Estates — Limitations— Contingencies— Remainder— Title— Deeds and Conveyances—Wills.*—A devise of the testator's estate to her two

ESTATES—*Continued.*

daughters, C. and J., and if J. should die without making a will, disposing of her share, or without children, her portion to C., or the children of C., if she be dead; at the death of C. her portion to go to her children; the estate of J. is in fee, defeasible upon her dying without children, with the further provision that, upon her so dying, to her sister, C., and should the sister be then dead, to her sister's children; C. taking a life estate with remainder to her children. Hence, a deed of the entire estate from both C. and J. would not convey the fee-simple, absolute title to the lands. *Smith v. Moore,* 370.

2. *Estate—Wills—Children—Presumptions—Issue.*—Where there is a devise of an estate to the testator's two daughters, still living, with limitation over, on the contingency of their having children, etc., the law does not presume that the possibility of issue is extinct. *Ibid.*

3. *Estates—Deeds and Conveyances—Remainders—Intent—Children—Rule in Shelley's Case.*—In order to effectuate the intention of the grantor as gathered from the terms employed in his deed to lands, it is *Held*, that by a conveyance thereof "to the use of the party of the second part for the term of his natural life, and from and after the termination of his estate, then to all his children born or to be born, and their heirs forever," a life estate was granted with remainder to the children "born or to be born," of the first taker, the word "children" not being in the sense of heirs, and the rule in *Shelley's case* does not apply. *Hutton v. Horton,* 548.

ESTATES TAIL.

Estates Tail—Statutes—Fee Simple—Heirs of the Body—Issues—Rule in Shelley's Case Distinguished.—Where the grantors, reserving an estate for their lives, have conveyed lands by deed to H. with *habendum* and warranty "to have and to hold to H. and heirs of her body or issue, to their only use and behoof forever," the word "issue" so used, and in connection with the expression, "heirs of her body," is construed to be the equivalent of the latter expression, which has its natural and primary significance of "lineal descendants to the remotest generation," and being an estate tail, is converted into a fee simple under the statute (Rev., sec. 1758); and the intention of the grantor is emphasized by the fact, in this case, that H. was unmarried at the time of the conveyance, without children, and evidently the only one considered or who was then in a position to take and hold the interest. *Ford v. McBrayer,* 171 N. C., 420, involving the interpretation of the rule in *Shelley's case,* cited and distinguished. *Parrish v. Hodge,* 133.

ESTOPPEL. See Deeds and Conveyances, 2; Torrens Law, 5; Executors and Administrators, 2; Mortgages, 5; Equity, 1; Wills, 12, 24; Judgments, 12, 13; Drainage Districts, 3.

1. *Estoppel—Landlord and Tenant—Tenant's Contracts—Landlord's Lien—Instructions.*—Where the landlord signs a contract for his tenant who cannot write, at his request, with a third person, under which the parties to the contract agree that the tenant should grow a crop upon the landlord's land for a division thereof, and the conduct of the landlord in signing the agreement for his tenant is sought to

ESTOPPEL—*Continued.*

estop him from claiming a part of the crops under his statutory lien, and the evidence is conflicting as to whether the landlord read the lien, an instruction by the court should be explicit upon the question of the landlord's knowledge of the contents of the written contract and as to whether he intended to release the rents, and an instruction assuming these to be facts as a matter of law is reversible error. *Upton v. Ferebee*, 194.

2. *Estoppel — Judgments — In Pais— Partition— Estates— Remainders.*— Where, under a mistake of law, the life tenant and remaindermen join in proceedings to partition lands among themselves as tenants in common, the parties thereto are estopped by the judgment therein to set up their title against a purchaser at the sale; and one not a party thereto is estopped *in pais* by his conduct in having been employed as a chain bearer in making the survey of the separate portions of the land, pointing out to the purchaser the part he was buying, and without asserting his own title thereto. *Hutton v. Horton*, 548.

ESTOPPEL IN PAIS. See Deeds and Conveyances, 7.

EVIDENCE. See Taxation, 2, 6; Contracts, 3, 6, 7, 8, 10, 13, 14, 16, 20, 24; Mortgages, 6, 8; Deeds and Conveyances, 1, 23; Monopoly, 1; Options, 1; Limitation of Actions, 4, 8; Statutes, 1; Trusts, 1, 2, 3, 5, 7; Employer and employee, 2, 4, 5, 7, 8, 10; Appeal and Error, 2, 9, 15, 17, 20, 23, 24, 25, 44, 45, 48, 49, 53, 56, 58, 59; Carriers of Goods, 3, 6; Husband and Wife, 5, 6; Verdict, 1; Attorney and Client, 2; Instructions, 3, 9; Judgments, 3, 15; Boundaries, 1, 2; Vendor and Purchaser, 6, 10; Negligence, 1, 2; Carriers of Passengers, 3; Damages, 1; Trespass, 1; Copyrights, 1, 2; Principal and Agent, 3, 4, 5, 6; Municipal Corporations, 5; Telegraphs, 4, 5, 7; Railroads, 5; Libel and Slander, 1, 2; Indictment, 3; Criminal Law, 1, 3, 4, 5, 9, 10, 11, 12, 15, 17, 18, 19, 20, 21; Intoxicating Liquor, 1, 2, 3, 4; Homicide, 1, 5, 6, 7, 8, 9, 10, 15, 18, 19, 20, 21; Witnesses, 1; Courts, 7.

1. *Evidence—Opinions—Facts—Experience and Observation—Potatoes—Cold Storage.*—Where the seller has contracted to place Irish potatoes in cold storage for future shipment, under a contract executory until accepted by the purchaser, and upon the latter's receipt thereof they are found to be in bad condition, a witness who, of his own knowledge, is aware of such condition at delivery, and is qualified to know from his own experience and observation in the handling of Irish potatoes the effect of cold storage upon them, etc., is qualified to testify, in his opinion, as to the condition of the potatoes when taken from cold storage for shipment. *Richardson v. Woodruff*, 47.

2. *Evidence—Master and Servant—Employer and Employee—Contributory Negligence—Assumption of Risks.*—In an action to recover damages of an electric power plant for the negligent killing of a lineman employed by it, and there are issues properly submitted on the questions of contributory negligence in his using his own leather gloves instead of rubber gloves, in catching hold of a heavily charged wire by reason of its proximity to another such wire, which he should have kept apart; and also, upon the issue of assumption of risks, testimony by an expert witness is competent which tends to show he had pre-

EVIDENCE—*Continued.*

viously warned the deceased of the danger, and that he had used an improper glove of his own selection. *Clements v. Power Co.*, 53.

3. *Evidence—Trusts—Parol—Letters—Hearsay—Appeal and Error—Prejudice—Reversible Error.*—Where the evidence is conflicting and close in a suit to engraft a parol trust in land conveyed to the defendant by deed absolute upon its face, and the plaintiff has introduced an unregistered deed to himself conveying an outstanding dower interest in the lands, claiming that the defendant had paid the purchase price in pursuance of the alleged parol agreement, which the defendant denied, the admission of a letter explanatory of the deed from the widow, introduced by the plaintiff himself, and not through her as a witness, tending to corroborate plaintiff's testimony that defendant paid the money for this deed, is hearsay, prejudicial, and reversible error, as it appears to have been used for the purpose of establishing the trust. *Bryant v. Bryant*, 77.

4. *Evidence—Letters—Hearsay.*—A letter from a third person written to the son of the plaintiff, tending to corroborate his evidence on a material fact involved in the action, may not be introduced in evidence, and the facts therein vested must be proved by the writer under oath as a witness, such being hearsay and *res inter alios acta. Ibid.*

5. *Evidence—Deeds and Conveyances—Recitals.*—The relevant recitals of a deed in a chain of title relied on are competent evidence of the authority of the grantor to make it. *Irvin v. Clark* cited with approval, 98 N. C., 437. *Baggett v. Lanier*, 129.

6. *Evidence—Nonsuit—Trials.*—Upon a motion to nonsuit, the testimony in support of plaintiff's claim must be taken as true and construed in the light most favorable to him. *McCotter v. R. R.*, 159.

7. *Evidence—Witnesses Instructed—Presumptions.*—Where the court directs a witness not to testify except as to competent matters specified by it, it will be assumed on appeal, nothing to the contrary appearing, that the witness understood the direction of the court and observed it. *Singleton v. Roebuck*, 201.

8. *Evidence—Deeds and Conveyances—Descriptions—Locus in Quo—Possession.*—When relevant to the inquiry, a party to an action involving title to lands may testify, when within his own knowledge, that his deed covered the lands in dispute, and that he had been let into possession thereof. *Ibid.*

9. *Evidence—Description—Corners—Appeal and Error—Prejudice—New Trials.*—A witness may state that he knew where the stump to a corner pine was located, when relevant to the inquiry in an action involving title to lands; and were the evidence incompetent it must be prejudicial to be reversible error. *Ibid.*

10. *Evidence — Damages — Railroads— Bridges— Abutting Owner— Subsequent Conditions—Expert Evidence—Opinions.*—Where the defendant railroad company is liable for damages to the land of an abutting owner of lands in erecting a bridge on a city street over its tracks, such damages is the difference in the value of the property caused by the elevation of the grade, and more properly at the time of the completion of the structure, but testimony of those qualified by ex-

EVIDENCE—*Continued.*

tended experience, and in regard to conditions of this permanent character, and in the absence of testimony showing appreciable change of conditions, is competent when their testimony is based upon their observation some two years afterwards. *Powell v. R. R.*, 243.

11. *Evidence—Damages—Railroads—Bridges—Abutting Owner.*—Where, in the building of a bridge across a street over its track, a railroad company has damaged the lot of an abutting owner by elevating the street in front thereof, plaintiff's testimony is competent evidence, and certainly not to the defendant's prejudice, as to the cost of filling in and restoring the lot, and elevating the building thereon, when the court has confined the jury, in their ascertainment of the damages to be awarded, to an amount within that of the depreciation of the market value. *Ibid.*

12. *Evidence—Damages—Railroads—Bridges—Assessed Valuation—Appeal and Error—Harmless Error.*—The valuation of the board of assessors for taxation is not evidence of the value thereof in the owner's action to recover of a railroad company damages thereto in building a bridge on its adjoining right of way; nor is it competent for the defendant to show that the plaintiff's predecessor in title appeared before the board to resist such valuation as being excessive. *Ibid.*

13. *Evidence—Deceased Persons—Transactions and Communications—Executors and Administrators—"Against Interest"—Statutes.*—In an action upon an account with the deceased, against his son and administrator, the plaintiff introduced his ledger, kept in his own handwriting, showing the balance claimed to be due, and offered to show by the defendant that both the defendant and his intestate knew in the latter's lifetime of this balance shown on the ledger to be due; that then the defendant made a partial payment thereon and promised to return and get a statement of the account, which he failed to do: *Held*, this evidence, offered through the defendant, was against his interest, and not incompetent under the statute, and its exclusion was reversible error. *Bunn v. Todd*, 107 N. C., 266, cited and applied. *Sorrell v. McGhee*, 279.

14. *Same—"Open Door."*—Where the defendant, administrator of the deceased, is put upon the stand by the plaintiff and forced to testify against his interest in an action upon an account with the deceased, the admission of this testimony is not objectionable on the ground that it would open the door to other and incompetent transactions and communications with a deceased person, prohibited by the statute, this being the result only when the defendant has voluntarily testified in his own interest. *Ibid.*

15. *Evidence—Deceased Persons—Transactions and Communications—Interest of Witness.*—A tenant of a deceased person who has settled with the deceased for goods bought by the former on the latter's account, who is not sought to be held liable in the plaintiff's action against the administrator of the deceased, is not interested in the event of the action, and is not prohibited by the statute as to communications or transactions with a deceased person, from testifying to the sale and delivery of the goods set out in the statement of the account sued on, and the exclusion of such testimony is of material evidence and constitutes reversible error. *Ibid.*

EVIDENCE—*Continued.*

16. *Evidence—Opinions—Subsequent Conditions.*—Where the determinative question to recover damages for defendant's negligently tying a lighter at a dock at 5 o'clock in the afternoon so that the tides during the night washed it against the dock and overturned it, to the plaintiff's damage, in the loss of timber loaded thereon, the opinion of a witness, based upon his observation on the morning of the next day, without explanation as to changes naturally brought about by the ebb and flow of the tide, is properly excluded. *Bryant v. Stone*, 291.

17. *Evidence—Benefit—Appeal and Error—Prejudice.*—Where the appellant has received the benefit of the testimony excluded by the witness having given it without objection in his other testimony his exception will not be sustained. *Ibid.*

18. *Same—Surmise—New Trial.*—Where the negligence of the defendant depends upon its not having properly tied a lighter, loaded with plaintiff's lumber, at a dock, it having floated under the dock and overturned during the night, thereby losing some of the lumber in the water by reason of the tide, etc., testimony as to other lighters at this dock being shifted by the carrier by water at night, and turned adrift and afterwards picked up in the river, is objectionable as mere surmise and conjecture; and certainly not a ground for a new trial where the appellant could not have been prejudiced. *Ibid.*

19. *Evidence—Impeachment—Former Examination.*—For the purpose of contradicting the testimony of a party to the action on a material fact at issue, it is competent, on cross-examination, to read to him and question him on his examination previously taken before the clerk of the court upon the same matter. *Bank v. Pack*, 388.

20. *Evidence—Depositions—Trial.*—A party to an action must offer at the trial the whole of the depositions of his own witness, including his cross-examination, for it to be competent. *Savings Club v. Bank*, 403.

21. *Evidence—Letters—Correspondence—Memoranda—Book Entries.*—The admission in evidence of a letter in the correspondence written by the objecting party, relating to a contract made by him for the sale of lumber, when material, may properly be admitted as his declarations; and entries made on the sales book by the witness may be used by him to refresh his memory as to the transactions entered, especially when he has testified to his independent recollection thereof. *Storey v. Stokes*, 410.

22. *Evidence—Deceased Persons—Against Interest.*—The testimony of an heir at law as to a partnership with deceased, claimed by another of the heirs at law, which is against his interest, is not incompetent under the statute prohibiting testimony of transactions and communications with deceased persons. *Price v. Edwards*, 493.

23. *Evidence—Writings—Telegrams—Parol Evidence.*—Where a telegram, material to the inquiry, has been given to the defendant's brother, and defendant has failed to produce it upon notice, and there is evidence that the original has been lost and the records in the telegraph office destroyed, it is sufficient to admit of parol evidence of its contents. *Morrison v. Hartley*, 618.

EVIDENCE—*Continued.*

24. *Evidence—Writings—Letters—Parol Evidence.*—Where the contents of a letter are not directly in issue and it is not the purpose of the action to enforce any obligation created by it, its contents may be shown by parol when relevant to the inquiry. *Ibid.*

25. *Evidence— Contracts— Lands—Fraud—Damages—Nonsuit—Trials.*—In an action to recover damages for fraud in inducing a purchase of real estate at a fictitious price, a judgment as of nonsuit upon the evidence will not be granted when it tends to show a false representation as to the value of the land made with the knowledge that it was untrue, and with intent to deceive, and was relied on by the other party to his damage. *Ibid.*

26. *Evidence— Contracts— Lands— Fraud— Measure of Damages.*—Where the defendant has induced the plaintiff by fraud to purchase land at an excessive price, the measure of damages is the difference between the real value of the lands and its value as fraudulently represented to be. *Ibid.*

27. *Evidence—Nonsuit—Motions—Trials.*—On a judgment of nonsuit against the plaintiff, the evidence which makes in his favor must be taken as true and construed in the light most favorable to him. *Angel v. Spruce Co.*, 622.

28. *Evidence—Instructions.*—*Held*, a question of fact for the jury under correct instructions given them. *Watt v. Hardware Co.*, 659.

29. *Evidence—Contracts—Lands—Fraud—Questions for Jury—Trials.*—In this action to enforce a contract to purchase land wherein plaintiff's title was denied upon the alleged existence of a prior similar contract made with another, with allegation and evidence that the prior contract had been procured by fraud: *Held*, there was sufficient evidence to sustain a verdict and judgment in plaintiff's favor, and no error found upon the trial sufficient to disturb them. *Mascari v. Lasater*, 660.

30. *Evidence— Corroborative— Rebuttal— Substantive—Conspiracy.*—Testimony may be competent in corroboration of another witness though incompetent as substantive evidence, and where a defendant, indicted for larceny of tobacco, has testified he was unfamiliar with the neighborhood in which it had been committed, and relied upon the assurance of his codefendant that the latter had taken it from the house of his uncle, with his consent, evidence in rebuttal of this statement is properly admitted. *S. v. Stancill*, 683.

31. *Evidence—Nonsuit—Trials—Questions for Jury.*—Upon motion to nonsuit in a criminal action, the plaintiff's evidence is to be considered in the light most favorable to him, and when it is thus found to be sufficient, its weight, and the credibility of the witnesses, are for the the determination of the jury. *S. v. Phillips*, 713.

32. *Evidence— Character— Substantive— Criminal Law—Instructions—Appeal and Error—Harmless Error.*—Testimony as to the character of witnesses other than the parties to a criminal action may not be regarded as substantive evidence, but where a party, with other witnesses, have testified at the trial, the charge of the court will not be held for reversible error when it appears that in apparently in-

EVIDENCE—*Continued.*

structing otherwise, he could only have been speaking with reference to those witnesses who were not parties. *Ibid.*

33. *Evidence—Hearsay—Criminal Law—Arson—Motive—Character—Appeal and Error—Reversible Error—Witnesses.*—Upon the trial of defendant as accessory before the fact of arson, written or printed notice to the defendant which had been served on him, was put in evidence under his objection, signed by the owner of the house and other influential neighboring landowners, forbidding the defendant and his wife to go upon their lands under the penalty of the law: *Held,* though it was introduced and admitted as to the owner of the burned dwelling, this "notice" did not sufficiently tend to show defendant's motive, and, otherwise, it was hearsay, and being highly prejudicial to the defendant, constituted reversible error, having the natural effect to throw into the jury box the unsworn estimate of influential property owners that the defendant was an undesirable neighbor and citizen. *S. v. Reid,* 746.

34. *Evidence—Interested Witnesses—Credibility—Instructions—Interests.*—Where witnesses interested in the result of the trial have testified, a charge of the judge respecting their testimony, to give it the same weight as other testimony, though they were interested, if the jury were satisfied they had told the truth, is correct. *S. v. Lovelace,* 763.

EXCEPTIONS. See Instructions, 4; Appeal and Error, 33, 35; Trials, 2.

EXCESSIVE FORCE. See Trespass, 1, 3.

EXCUSABLE NEGLECT. See Judgments, 10.

EXECUTION. See Judgments, 14.

EXECUTORS AND ADMINISTRATORS. See Statutes, 3; Clerks of Court, 1; Mortgages, 10; Evidence, 13; Wills, 17; Judgments, 12.

1. *Executors and Administrators—Actions—Venue—Statutes.*—Revisal, sec. 415, provides that the action against a deceased party may be continued by or against his representative or successor in interest, and Revisal, sec. 417, requires that, in such instances, the summons shall be returnable before the clerk and in effect the action shall be ready for a speedy trial, thus recognizing the continuity of the action and the trial thereof in the county in which it had been brought; and Revisal, sec. 421, relative to actions against the administrator or personal representative of a deceased defendant, or any surety, etc., does not control the venue in such matters. *Latham v. Latham,* 12.

2. *Executors and Administrators—Substituted Trustee—Courts—Estoppel—Parties—Statutes—Trusts.*—Where an executor under a will with power to sell the lands of his testate and reinvest the proceeds, etc., has died, and all persons in present and contingent interest have been made parties to an action (Rev., 1590) wherein the court has substituted another as trustee, upon like trusts in every respect, and the decree was not appealed from, all the privies and parties are estopped as to all issuable matters therein, and may not deny the power of the substituted trustee to make the sale of the lands as the executor under the will was therein authorized to make. *Hayden v. Hayden,* 259.

EXEMPTIONS. See Appeal and Error, 14; Vendor and Purchaser, 4.

EXONERATION. See Principal and Surety, 1.

EXPECTANCY. See Damages, 1, 3.

EXPERTS. See Copyrights, 2.

EXPRESS. See Carriers of Goods, 18, 20, 21; Employer and Employee, 5; Judgments, 3; Parties, 4; Courts, 2.

FEDERAL COURTS. See Carriers of Goods, 16; Removal of Causes, 2, 4.

FEDERAL EMPLOYERS' LIABILITY ACT. See Railroads, 4.

FEDERAL GOVERNMENT. See Constitutional Law, 11.

FEDERAL STATUTES. See Carriers of Goods, 7; Interstate Commerce, 1.

FI. FA. See Banks and Banking, 1.

FINDINGS. See Injunction, 1; Habeas Corpus, 2; Appeal and Error, 4, 14, 22, 35; Witnesses, 1.

FIXTURES. See Statutes, 14.

FORECLOSURE. See Trusts, 7.

FORFEITURE. See Usury, 1.

FORGERY. See Banks and Banking, 2.

FRAUD. See Husband and Wife, 5, 6; Schools, 4; Banks and Banking, 2; Deeds and Conveyances, 13, 15, 19; Pleadings, 4, 5; Vendor and Purchaser, 6; Copyrights, 1; Municipal Corporations, 9; Appeal and Error, 34; Elections, 1; Limitation of Actions, 7; Evidence, 25, 26, 29.

FUNDS. See Interpleader, 1; Constitutional Law, 10, 21; Mortgages, 4; Wills, 11; Courts, 4; Clerks of Court, 2.

FURNITURE. See Statutes, 14.

GASOLINE. See Appeal and Error, 4.

GUARANTY. See Banks and Banking, 3.

GUARDIAN. See Deeds and Conveyances, 12.

HABEAS CORPUS.

1. *Habeas Corpus—Parent and Child—Custody of Child.*—The parents of an infant child have *prima facie* the right and preference of its custody and control against the claim of others; but this right is not universal and absolute and will yield when it is shown that the welfare and best interest of the child clearly requires it. *In re Warren*, 43.

2. *Same—Findings—Award—Strangers—Contracts.*—The mother of an illegitimate child, eighteen months of age, entered into a written contract, under seal, with the respondent, conveying the right of control and natural guardianship of the infant until it became twenty-one

HABEAS CORPUS—*Continued.*

years of age. The lower court found, upon sufficient evidence, that the petitioner had at that time no means for supporting the infant, was a prostitute, leading a wandering life, but since had married a respectable man, to whom she had borne a child, who worked and supported his family in good, religious and educational environment; that the respondent was a good man and loved and cared for the child, now five years of age, as a parent; was able to support it, had placed it in good, religious and educational environment, and, having no child of his own, was treating it as his own, with the intention of adopting it: *Held*, upon these findings, a judgment was a proper one, that the welfare and best interest of the child required that it remain for the present with the respondent, and so ordering. As to whether the conveyance was sufficient in itself, *quære? Ibid.*

HARMLESS ERROR. See Appeal and Error, 2, 48, 53; Spirituous Liquor, 2; Evidence, 32; Homicide, 1.

HEARSAY. See Evidence, 33; Criminal Law, 15.

HEIRS. See Deeds and Conveyances, 12; Injunctions, 3; Descent and Distribution, 1, 2; Wills, 7, 18, 20, 21, 22; Deeds and Conveyances, 10; Estates Tail, 1.

HIGHWAYS. See Constitutional Law, 2, 3; Contempt, 1; Counties, 1, 2, 3, 4; Courts, 3; Municipal Corporations, 2.

HOMESTEAD. See Appeal and Error, 14; Vendor and Purchaser, 4.

HOMICIDE. See Indictment, 2; Appeal and Error, 50, 51, 56.

1. *Homicide — Murder — Evidence— Circumstantial Evidence— Nonsuit— Trials—Questions for Jury.*—Upon the trial for a homicide, there was evidence tending to show that the defendant, while married to another woman, had unlawfully been living with the deceased; that preceding her death he had quarreled with her, and on the day thereof visited her house in an ill humor and told her, "We had just as well have a war here as to go to France and have it"; asked her to follow him to a place near by, which she did; was never seen alive thereafter, and her body was found, with the throat cut, in a thicket near the place the defendant had designated for their meeting. There was further evidence that deceased had a sum of money in her stocking, in anticipation of taking a journey, and, among other things, a ring on her finger the defendant had given her, and that when her body was found the stocking of the deceased was turned down, the money missing, as also was the ring deceased had given her. There was further circumstantial evidence that the deceased had had her throat cut with a knife she had been carrying, after having voluntary sexual intercourse with the defendant: *Held*, sufficient circumstantial evidence to show that the deceased had not committed suicide, but that she was murdered by the prisoner, and to sustain a verdict of murder in the second degree. *S. v. Bryant*, 702.

2. *Homicide—Murder—Opinion—Collective Facts.*—The testimony of a witness describing the situation, the surroundings and appearance of the place of the homicide for which the prisoner was on trial, is proper to be considered in connection with the circumstantial evidence

HOMICIDE—*Continued.*

in this case tending to show his guilt, and comes within the rule that instantaneous conclusions of the mind derived from a variety of facts presented to the senses at one and the same time, and descriptive of places and things, are admissible. *S. v. Spencer*, 176 N. C., 709, and other like cases, cited and applied. *Ibid.*

3. *Homicide—Murder—Criminal Law—Alibi—Burden of Proof—Instructions.*—On the trial of an indictment for a homicide, an instruction that the defendant must satisfy the jury of the alibi on which he relies in his defense, is not erroneous or prejudicial, when coupled with the additional instruction to the effect that if the defendant has failed to do this they must then inquire as to his guilt, and if they are satisfied of the same beyond a reasonable doubt, they will return a verdict of guilty, and if not so satisfied, they will return a verdict of not guilty, approving *S. v. Freeman*, 100 N. C., 429, and other cases cited, as to correct rule regarding the proof, or failure of proof, where defendant relies on an alibi. *Ibid.*

4. *Homicide—Murder—Self-defense—Burden of Proof—Quantum of Proof.* It is reversible error for the judge to instruct the jury, upon a trial for a homicide, that the defendant must prove beyond a reasonable doubt that the defendant had shot the deceased under his reasonable apprehension that it was necessary to save his own life or himself from great bodily harm, it being only required that he satisfy the jury of the truth of the facts upon which he relies in defense. *S. v. Little*, 722.

5. *Homicide—Murder—Evidence.*—Evidence, upon the trial of a homicide, that the prisoner drew his pistol and shot the deceased four times, inflicting death, without evidence that the deceased was armed, is sufficient to sustain a verdict of murder in the first degree. *Ibid.*

6. *Homicide—Murder—Manslaughter—Evidence—Malice—Instructions.*—Evidence that the prisoners tried for homicide were operating an illicit still in the neighborhood of the house of the deceased, which had been captured and destroyed, that the prisoners accused the deceased of giving the information, and threatened him if the still was not replaced by a certain night, and within a short time thereafter the killing occurred at night at the home of the deceased, with testimony that the prisoners attacked in a body, firing a number of shots, one of which took fatal effect, is sufficient to show motive and killing with premeditation, and to justify a verdict of murder in the first degree, and, without further testimony, for an instruction that there was no evidence of manslaughter; or, *Semble*, of murder in the second degree. *S. v. Cain*, 724.

7. *Homicide—Murder—Evidence—Dying Declarations.*—Dying declarations as to the identity of the prisoners on trial for a homicide are not rendered incompetent to be submitted to the jury by the fact that the physician, to whom they were made, told the deceased, after the former had said he would die from the wound he had received, that he would not, the deceased then reaffirmed that he would. The court having found that these statements were made under an impending sense of death, properly left them to the consideration of the jury. *Ibid.*

HOMICIDE—*Continued.*

8. *Homicide—Murder—Evidence—Common Design.*—Where there is evidence that the prisoners threatened the deceased if he did not replace a destroyed still they accused him of giving information about, and that the prisoners attacked the home of the deceased in a body at night, all firing upon him, and one of the shots taking fatal effect, a charge is correct that if the jury should find beyond a reasonable doubt that the prisoners formed a common design and purpose to go to the house of the deceased and assault him with firearms, or to inflict great bodily harm upon him, and in pursuance thereof, one of them shot and killed him according to a common purpose, all the prisoners would be guilty of murder in the first degree. *Ibid.*

9. *Homicide—Murder—First Degree—Instructions—Evidence—Premeditation.*—Evidence in extenuation offered by the prisoner upon trial for a homicide, cannot be considered on appeal from the refusal of the court to charge the jury that the evidence would not warrant a conviction of murder in the first degree, but only the single question as to whether there is evidence of premeditation and deliberation, if the evidence is otherwise sufficient. *S. v. Lovelace*, 762.

10. *Homicide—Murder—First Degree—Evidence—Husband and Wife—Parental Influence.*—Where there is evidence tending to show that the deceased missed his wife from his home after returning from his work, and traced her to her parent's home; that he had previously complained of her parents' interference between his wife and himself, and threatened to kill them if they continued therein; that after he had failed to induce his wife to talk privately with him in his effort to get her to return to his home, he went away, and as the parents and their daughter were sitting upon the porch, he came back again, and taking hold of her, he shot her father twice, without offer of violence on his part, inflicting the mortal wound, and threatened death to the others if they did not comply with his wish: *Held*, sufficient upon the question of deliberation and premeditation of the plaintiff to be determined by the jury upon the issue as to murder in the first degree. *Ibid.*

11. *Homicide—Murder—Defense—Instructions—Appeal and Error—Harmless Error.*—Where the defendant contends upon his trial for homicide that the fatal shot was fired accidentally, a charge that the defendant did not contend that he acted in self-defense is consistent with his position, and it is *Held*, that the defense would be considered to be what the evidence made it, and not what the defendant called it, and if the defendant received the benefit thereof it would not be prejudicial to him. *Ibid.*

12. *Homicide—Murder—Bystander—Accidental Killing.*—Where one man, engaged in an affray or difficulty with another, unintentionally kills a bystander, his act shall be interpreted in reference to his intent and conduct towards his adversary, and his criminal liability for the homicide or otherwise, and the degree of it, must be thereby determined. *S. v. Dalton*, 779.

13. *Same—Instructions—Appeal and Error—Reversible Error.*—Where there is evidence, on the trial for a homicide in the accidental killing of a bystander by the prisoner in a fight with another, that the pris-

HOMICIDE—*Continued.*

oner's intent in such fight was either murder in the first degree, murder in the second degree, or that he acted in self-defense, this intent will govern the degree of the crime committed, or the acquittal, as to the killing of such bystander; and it is prejudicial and reversible error for the court to instruct the jury that they should find the prisoner guilty of murder in the first degree, if they found the intent was for murder in the second degree, and make the verdict to depend upon whether the prisoner's intent was to commit a felony, etc. *Ibid.*

14. *Same—Statutes—Degrees of Murder—Common Law.*—Our statute, Rev., 3631, dividing murder into two degrees, one punishable by death and the other in the State's Prison, does not give any new definition of murder, but the same remains as it was at common law before the enactment; *i. e.*, the unlawful killing of a human being with malice aforethought, which malice may or may not arise from a personal ill-will or grudge, it being sufficient if there is an intentional killing without excuse or mitigating circumstances; and where there is an accidental killing of a bystander, it does not come within the classification of murder in the first degree merely because it occurred in the perpetration of, or effort to perpetrate a felony, but the prisoner's intent to kill his adversary must be shown beyond a reasonable doubt to have been willful, deliberate and premeditated, and to be determined upon the principles of the common law. *Ibid.*

15. *Homicide—Murder—Evidence—Capias.*—Where there is evidence tending to show that the prisoner was guilty of or participated with others who had been previously tried for the same crime, it is competent to show that on the former trial he was compelled to testify under a *capias ad testificandum*, as an unwilling witness which, though having little weight in itself, was a circumstance to be taken with the other evidence in the case. *S. v. Wiseman*, 784.

16. *Homicide—Murder—Burden of Proof—Instructions.*—An instruction upon the trial of a homicide to acquit the prisoner should the jury find the contentions of his counsel to be true, upon all the evidence, is not objectionable as relieving the State of the burden to show guilt beyond a reasonable doubt, when the judge has repeatedly, throughout his charge, emphasized this requirement. *Ibid.*

17. *Homicide—Murder—Lying in Wait—Accomplice.*—Upon evidence tending to show that the prisoner singly, or with one or two others, awaited the train on which the deceased was to arrive after nightfall, the darkness increased by mist and clouds, and they or he continued to shoot him to death at close range as he was leaving the train, and went secretly and hastily away: *Held*, whether the prisoner alone, or with others, committed the homicide, the evidence is sufficient to be submitted to the jury upon the question as to whether the prisoner waylaid the deceased, within the meaning of the statute, and, with the other evidence in the case, to sustain a verdict of murder in the first degree. *Ibid.*

18. *Homicide—Murder—Identity—Evidence—Questions for Jury—Trials.*—Where the evidence is conflicting as to the identity of the prisoner as the one who had shot and killed the deceased as he was leaving a train on which he had been a passenger, and there is direct and positive

HOMICIDE—*Continued.*

testimony of passengers on the coach as to the dress and appearance of the prisoner, seen from the light of the car windows, whose name they did not know at the time, but afterwards definitely knew, and identified, this question of identity is one of fact for the exclusive determination of the jury. *Ibid.*

19. *Homicide—Murder—Motive—Evidence—Trials.*—Where, upon the trial for a homicide, there is evidence that the prisoner laid in wait for the deceased and fired upon and killed him, it is unnecessary to separately show the prisoner's motive for the killing by evidence independently directed to it, though such evidence may be a material element for the jury to consider in passing upon the prisoner's guilt, and its absence a circumstance in his favor. *Ibid.*

20. *Homicide—Murder—Accomplice—Evidence.*—Where there is evidence tending to show that the prisoner and two certain others were lying in wait to assassinate the deceased, and that they fired ten shots in rapid succession, taking effect and causing death, an instruction of the court to the jury is correct, that if they found the facts accordingly the prisoner would be guilty of murder in the first degree if he was present at the time and acted in concert with and aided and abetted the others therein. *Ibid.*

21. *Homicide—Murder—Evidence—Second Degree.*—Where the whole evidence tends only to show a murder accomplished by lying in wait and the deliberate and premeditated killing of the deceased, it is not error in the Superior Court judge to fail to submit to the jury any question as to the murder being in the second degree, for the verdict should be either murder in the first degree or an acquittal. *Ibid.*

HUSBAND AND WIFE. See Constitutional Law, 1, 18; Tenants in Common, 1; Taxation, 5; Deeds and Conveyances, 19, 20; Homicide, 10; Criminal Law, 4, 15.

1. *Husband and Wife—Alimony—Attachment—Ancillary Remedy—Statutes.*—Chapter 24, Public Laws 1919, is an ancillary remedy given to the wife abandoned by the husband, "to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband," thus giving her a remedy both *in personam* and *in rem.* *Walton v. Walton*, 73.

2. *Same— Contracts— Summons— Service— Publication.*— An attachment against the husband's land will lie in favor of the wife, abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract, that he support and maintain her, under the statute declaring and enforcing it and under the order of court; and attachment of the husband's land is a basis for the publication of summons. Ch. 24, Laws 1919. *Ibid.*

3. *Husband and Wife—Alimony—Debtor and Creditor—Priority.*—The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of his abandonment, which puts every one on notice of her claim and her priority over other creditors of her husband. *Ibid.*

4. *Husband and Wife—Lands—Entirety—Sale—Severalty—Intent—Conversion—Estates.*—Where the husband and wife own the title to

HUSBAND AND WIFE—*Continued.*

lands in entirety and sell the same, and it is shown that they divided the proceeds with the intent of holding, and held the same, in severalty, the unity of the title is severed, and the husband's part thereof can be subjected to payment of the claims of his creditors. As to whether the fact of sale alone would have this effect, *quære? Moore v. Trust Co.*, 118.

5. *Same—Fraud—Evidence—Trials.*—A husband and wife held the title to lands in entirety and sold the same and the husband divided the proceeds of the sale and deposited the same to his wife's credit in two banks. The wife claimed the ownership of both deposits, claiming that the purchase of the land was made from her separate estate, and by mistake of the draftsman it was conveyed to her husband and herself in entirety, and there was evidence tending to show that the husband had theretofore been perfectly solvent but at the time in question was insolvent, and that he had told his creditor, the defendant in the action, "that all his property was in his wife's name, and that he could whistle for his money," and there was other evidence of fraud: *Held*, evidence sufficient to sustain a verdict to the effect that the proceeds of the sale were held by them in severalty, and that the transaction as to the deposit in defendants' bank was in fraud of the rights of the creditor. *Ibid.*

6. *Husband and Wife—Lands—Entirety—Conversion—Fraud—Evidence—Appeal and Error—Estates.*—Where the determining questions in a suit by a creditor of the husband are, whether the proceeds of the sale of land formerly held by him and his wife in entirety were thereafter held in severalty and half thereof deposited in the defendant bank in the wife's name, in fraud of the defendant's right to offset the amount by that of the male defendant's note due and held by the defendant, testimony of the male defendant as to his partnership with a third person, or whether their grantee of the land had assumed the debt, without defendants' consent, or as to why the male plaintiff had not paid the note, is irrelevant and was properly excluded. *Ibid.*

7. *Husband and Wife—Actions—Personal Injury—Statutes.*—Since the passage of chapter 13, Laws 1913, a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted; in this case, a trespass with the use of excessive force. Revisal, 408 (1). *Kirkpatrick v. Crutchfield*, 348.

8. *Husband and Wife—Deeds and Conveyances—Statutes—Void Deeds—Color—Adverse Possession—Limitation of Actions.*—The possession of lands by the husband under a deed made to him by his wife, void for noncompliance with Rev., 2107, is for the benefit of the wife, and during the continuance of the marriage relation during her life cannot be considered as adverse to her and ripen title in him by sufficient adverse possession. *Semble*, after her death, his possession would be adverse possession against her heirs; and *quære* as to whether it would be such before demand is made for possession. *Kornegay v. Price*, 441.

9. *Husband and Wife—Elopement of Wife—Definition.*—Elopement of the wife is her voluntary act in deserting her husband to go away with and cohabit with another man. *S. v. O'Higgins*, 708.

IDENTITY. See Homicide, 18.

IMPROPER REMARKS. See Trials, 1; Jurors, 1.

INCONSISTENT POSITIONS. See Appeal and Error, 6.

INDEBITATUS, ASSUMPSIT. See Assumpsit, 1.

INDICTMENT. See Sheriffs, 1; Larceny, 1; Criminal Law, 7, 16.

1. *Indictment—Verdict—Instructions—Statutes—Juries—Poll—Questions for Jury—Trials.*—Where a sheriff is tried under an indictment under Rev., 3408, for unlawfully, willfully, and feloniously failing to pay moneys which he has collected by virtue of his office to the proper parties entitled, it is reversible error for the trial judge to poll the jury before verdict as to whether they believed the testimony of the defendant himself, stating he had proved himself a man of good character, and instructing them to find him guilty of the offense charged upon his own testimony, if believed, the presumption being that he was innocent of the offense, with the burden of proof upon the State to show guilt beyond a reasonable doubt, and the fact of his guilt being a question solely for the jury to determine. *S. v. Windley*, 670.

2. *Indictments—Severance—Motions—Murder—Different Defenses—Conspiracy—Homicide.*—Upon a motion for a severance under an indictment charging two defendants with murder, the refusal of the trial judge is within his discretion, and not reviewable on appeal in the absence of its abuse, as, in this case, where the only grounds relied on for the motion are that the defense as to one would not apply to the other, and there was no charge of a conspiracy between the defendants to commit the murder charged against them. *S. v. Southerland*, 676.

3. *Indictment—Larceny—Conspiracy—Common Design—Evidence.*—When the indictment is for conspiracy of several defendants to steal from a person specified therein, evidence of theft by the several defendants from a certain other person, not named in the indictment, is competent, when there is evidence that it was a part of a series of transactions in pursuance of an original design, or conspiracy, and sufficiently connected with the main charge to show the defendant's intent or a common purpose. *S. v. Stancill*, 683.

4. *Indictments—Counts—Larceny—Receiving.*—A count for larceny and one for receiving stolen goods, etc., may be joined in the same indictment. *S. v. Mincher*, 698.

5. *Indictment—Warrant—Form—Waiver—Criminal Law.*—Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants. *S. v. Prevo*, 740.

INJUNCTIONS. See Contempt, 1, 2; Interpleader, 1; Monopoly, 1; Municipal Corporations, 8; Appeal and Error, 34; Elections, 1.

1. *Injunctions—Contempt—Findings—Appeal and Error.*—A violation of an order enjoining a defendant from obstructing a public highway in violation of plaintiff's rights is in contempt of court, and on appeal

INJUNCTIONS—*Continued.*

the findings of fact by the Superior Court judge are not reviewable in a collateral proceeding. *Keys v. Alligood*, 17.

2. *Injunction—Parties—Mortgages—Warranty—Deeds and Conveyances—Equity—Purchasers.*—Where a mortgagor has sold his equity of redemption in the mortgaged lands by deed containing warranty of title he may maintain his suit to enjoin the sale by the mortgagee, as he is a party vitally interested, under his warranty; and where his purchaser is a party to the suit, objection that the mortgagor is not the proper party to maintain the suit is untenable. *Rogers v. Piland*, 70.

3. *Injunction—Deeds and Conveyances—Timber—Deceased Owner—Option—Payment—Heirs.*—An injunction against the grantee of standing timber should be made permanent when it is properly established that he is cutting the timber from the lands after the death of the owner, and has failed to pay to the heirs at law, entitled to receive it, a stipulated price for an extension period, under which he claims the right. *Morton v. Lumber Co.*, 164.

INSTRUCTIONS. See Descent and Distribution, 1; Verdict, 1; Insurance, Life, 1; Limitation of Actions, 2, 3; Appeal and Error, 11, 15, 16, 28, 32, 40, 41, 42, 43, 44, 48, 50, 52; Estoppel, 1; Vendor and Purchaser, 7; Sheriffs, 1; Deeds and Conveyances, 23; Principal and Agent, 6; Evidence, 27, 32, 34; Homicide, 3, 6, 9, 11, 13, 16; Indictment, 1; Trials, 2; Courts, 7; Options, 7; Employer and Employee, 6; Trusts, 3, 6; Carriers of Goods, 13, 20; Municipal Corporations, 5; Damages, 5; Negligence, 3; Spirituous Liquors, 1; Larceny, 2; Criminal Law, 13, 17.

1. *Instructions—Interpretation—Fragmentary Parts—Jurors—Presumptions.*—A charge of the court to the jury must be naturally and reasonably construed as a whole, giving effect to every essential part of it, and not disconnectedly, and upon the assumption that the jurors are men of understanding and intelligence. *Harris v. Harris*, 8.

2. *Instructions—Title—Burden of Proof.*—Where the instruction of the trial judge has placed the burden upon the plaintiff to show his own title, and it was stated that he can only recover thereon and not on the weakness of the defendant's title, the further statement that the defendant took chances of failing to show defects in his adversary's title in not introducing evidence will not be construed into an instruction that he must introduce evidence in rebuttal of plaintiff's testimony, but only that it was his duty to go forward with his proof. *Singleton v. Roebuck*, 201.

3. *Instructions—Damages—Railroads—Common Benefits—Separate Benefits—Evidence.*—In this case it is held that the judge properly charged the jury on the question of excluding damage or benefit common to the community at large in the building of a bridge by the defendant railroad company, and, under the evidence, as to excluding the damage by reason of benefits or advantages peculiar to the property. *Powell v. R. R.*, 244.

4. *Instructions—Full of Explicit—Appeal and Error—Exceptions.*—Requests for special instructions should be tendered, and when not covered by the charge, in the absence of such request, an exception that the instruction given was not full and explicit will not ordinarily be held as error on appeal. *Futch v. R. R.*, 282.

INSTRUCTIONS—*Continued.*

5. *Instructions—Contentions—Appeal and Error—Objections and Exceptions.*—The appellant should have asked the trial judge, at the time, to state such of his contentions as he claims were omitted, and having failed to do so, his exceptions on that ground will not avail him in this Court on appeal. *Ibid.*

6. *Instructions—Contentions—Appeal and Error—Objections and Exceptions.*—Objection that the trial judge stated the contentions of the adverse party more fully than those of the appellant to his prejudice should be made at the time by calling the attention of the judge to the omissions claimed that he had made, and comes too late after verdict. *Sears v. R. R.*, 285.

7. *Instructions—Requests—Additional Instructions—Appeal and Error.*—Other instructions than those given by the trial judge should be especially requested, and exceptions taken to their refusal to be available on appeal. *Ibid.*

8. *Instructions—Inadequacy—Statutes.*—Exceptions in this case that the charge of the trial judge was inadequate, and not in compliance with Rev., sec. 535, are not only untenable, but too general. *Blake v. Smith*, 163 N. C., 274, cited and distinguished. *Ibid.*

9. *Instructions—Burden of Proof—Evidence—Greater Weight—Appeal and Error.*—*Held*, in this case, an instruction that the burden was on the plaintiff to satisfy the jury by the evidence that her injuries were caused by the wrongful acts of the defendant, is not reversible error to defendant's prejudice because of the failure of the judge to add "by the greater weight of the evidence." *Kirkpatrick v. Crutchfield*, 348.

10. *Instructions—Employer and Employee—Master and Servant—Negligence—Physicians—Malpractice.*—Where a corporation is liable for damages caused by the malpractice of a physician while attending, professionally, one of its employees, and an issue has been submitted in his action as to whether the corporation had continued to employ the physician after notice of his incompetency, a charge of the court to find the issue in the affirmative, if the defendant had ascertained from all sources the physician's incompetency, should be read in connection with another portion of the charge, that the jury should find this to be a fact by the greater weight of the evidence, and when so read, the instruction is not erroneous. *Woody v. Spruce Co.*, 591.

11. *Same—Assumption of Risks.*—Where there is an issue as to whether the plaintiff, an employee of the defendant corporation, assumed the risk of being professionally treated by a physician the defendant had selected, and for whose lack of skill the defendant was liable, an instruction upon the evidence is not erroneous that the jury find the issue "No" if plaintiff asked the defendant's president and general manager if he had not better send for another physician, and was advised by him to the contrary, that he, the president, and the physician could perform the services as good as any one, and that the plaintiff had the right to rely upon such assurance. *Ibid.*

12. *Instructions—Prayers for Instruction—General Charge—Trials.*—The refusal of the prayers for instruction aptly tendered by appellant is

INSTRUCTIONS—*Continued.*

no ground of error on appeal if such have been substantially covered by the judge, in his charge to the jury, in his own language. *S. v. Baldwin*, 693.

13. *Instructions—Appeal and Error—Error Cured.*—Where the defendant is tried under the statute which makes the possession of more than one gallon of spirituous liquor evidence that it was for the purpose of sale, and the trial judge has erroneously instructed the jury that the law "presumed" from the bare fact of such possession an intent or purpose to sell, this error is cured when he immediately corrects it by charging the correct rule as to the *prima facie* case, presumption of innocence, reasonable doubt, and burden of proof, so that the jury were not mislead. *S. v. Bean*, 175 N. C., 748, and other like cases, approved. *Ibid.*

14. *Instructions—Larceny—Criminal Law—Subsequent Conduct—Defenses.* An instruction upon supporting evidence that if the jury found that the defendant committed the crime charged, whatever he afterwards may have done was neither a defense or condonement of it in law, is a proper one. *S. v. Caylor*, 807.

INSURANCE, LIFE.

1. *Insurance, Life— Policies— Contracts— Suicide— Defenses— Burden of Proof—Instructions—Jury—Trials.*—The burden is on the defendant life insurance company, in an action on the policy, to show that the deceased, insured, committed suicide which invalidated the policy, according to its terms, when this is relied upon as a defense, which will take the case to the jury upon the issue. *Wharton v. Ins. Co.*, 135.

2. *Insurance, Life—Policies—Contracts—Accidents—Passengers—"Traveling."*—Where there is a liability under the provisions of a policy of life insurance, "when the death of the insured was caused directly by accident while traveling as a passenger" by common carriage, the fact that the insured was accidentally killed at an intermediate station, after he got off the train until it should start again, and while attempting to board it to continue his journey, does not deprive him of his status as a passenger under the provision of the policy, or avoid liability on the part of the company. *Ibid.*

INTENT. See Vendor and Purchaser, 2; Husband and Wife, 4; Wills, 2, 9; Statutes, 6, 15, 16; Estates, 4; Deeds and Conveyances, 23; Intoxicating Liquors, 2.

INTERPLEADER. See Appeal and Error, 6; Mortgages, 4.

Interpleader—Partition—Title—Funds in Court—Clerks of Court—Timber —Injunction—Pleadings.—Where an order restrained defendant, in possession of land, from cutting the timber thereon till the final hearing, in proceedings to partition it, involving title, and the order has been modified, by consent, so as to permit the defendant to continue to cut the timber upon condition that the money for the timber cut should be paid into the hands of the clerk of the Superior Court awaiting final disposition of the action, an order permitting a third party to intervene and claim the fund under a superior title is not errone-

INTERPLEADER—*Continued.*

ously entered; and without alleging any cause of action against either of the original parties, he may recover the fund in the hands of the clerk upon proving his title, as claimed by him. *Roughton v. Duncan*, 5.

INTEREST. See Boundaries, 1; Statutes, 1; Evidence, 13, 22, 34; Waiver, 1; Trusts, 4; Mortgages, 9; Usury, 1.

INTERSTATE COMMERCE. See Commerce; Carriers of Goods, 1, 2, 3, 4, 7.

1. *Interstate Commerce—Freight Rates—Illegal Rates—Contracts—Bills of Lading—Knowledge—Representations—Federal Statutes.*—The intent and purpose of U. S. Compiled Statutes (1916), secs. 8569 and 8574, under the title of "Interstate and Foreign Commerce," is to prevent any discrimination as to interstate freight rates for the transportation of commodities of the same classification among shippers and an agreement for the carrier to receive or the shipper to pay a different or less rate of freight than determined upon by the Interstate Commerce Commission, directly or indirectly, whether existing with or without the knowledge of either or both of the contracting parties at the time, and irrespective of any representations made, is unenforcible and void; and where the shipper has contracted in his bill of lading to pay a less rate than that prescribed by the law, and, relying upon the assurance of the carrier to endeavor to obtain a refund, pays the difference between that and the lawful rate, he may not recover this difference in the courts of our State, the contract sued on being an illegal one as encouraging rebates and and unlawful discrimination and not recognizable therein. *Cotton Mills v. R. R.*, 212.

2. *Interstate Commerce—Commerce Commission—Rates—Overcharge—Carriers—Agreement—Anticipated Adjudication—Courts.*—Where the carrier in interstate commerce has failed in its promise to present duly and in proper form the shipper's claim for an alleged overcharge of freight rate which the latter had paid to the carrier, and thus prevents the shipper from presenting his own claim within the time allowed by the statute, and consequently said commission, having then no authority, refuses to pass upon the matter at all, our courts may not adjudicate the question, the same being for the determination of said commission upon whatever evidence may have been introduced before it, and as its determination thereon, favorable or unfavorable, cannot be anticipated or foreseen, any assessment of damage based upon it would be purely speculative and not allowable. *Ibid.*

INTOXICATING LIQUORS. See Spirituous Liquor; Statutes, 19.

1. *Intoxicating Liquors—Statutes—Possession—Evidence—Presumptions.* The statute, Laws 1913, ch. 44, sec. 2, makes the possession of more than one gallon of spirituous liquor at any one time, whether in one or more places, *prima facie* evidence of having it for the purpose of sale, and when such possession has been shown, a verdict of guilty will be sustained. *S. v. Simons*, 679.

2. *Same—Intent—Subsequent Conditions.*—Where there is evidence that the defendant, indicted under chapter 44, section 2, Laws 1913, had in his possession sufficient spirituous liquors to raise the *prima facie*

INTOXICATING LIQUORS—*Continued.*

presumption that it was for the purpose of sale, it is competent to show this intent, and in furtherance of the presumption, that soon thereafter, about two months, he was found working on a copper still on his premises, and had copper enough to make two of them; and that, upon his premises being searched, he had falsely denied the possession and had attempted to shoot the officer making the search. Cases where offenses are committed in sudden temper, under violent provocation or by the impulse of passion, distinguished. *Ibid.*

3. *Intoxicating Liquor—Distilling—Evidence—Accessory—Criminal Law.*—Upon trial for illicit distilling there was evidence tending to show that the defendant, on the occasion of an officer searching for a still, took his gun and fired several times in the air, and when the place was found there was no one there, and the still part had been removed, but the balance of the outfit was there, giving indication of recent use, with fire in the furnace: *Held,* sufficient to convict, the purpose of the defendant thus firing evidently being to abet the distillers and to enable them to escape, thus making him an accessory equally guilty with the principals. *S. v. Killian,* 753.

4. *Intoxicating Liquors—Criminal Law—Transporting—Statutes.*—A conviction for the unlawful transportation of liquor, chapter 97, Laws 1913, cannot be sustained when the defendant was transporting his own liquor, but not for the purpose of sale, and only gave the package to his companion to take a drink. *S. v. Coleman,* 758.

ISSUES. See Appeal and Error, 1, 2, 13, 15, 30; Schools, 4; Attachment, 1; Pleadings, 2; Estates Tail, 1; Deeds and Conveyances, 14; Estates, 2; Trusts, 7; Negligence, 3; Removal of Causes, 1.

1. *Issues—Trials.*—Issues are sufficient when they cover the case and present all matters in controversy. *Bank v. Park,* 388.

2. *Issues—Trespass.*—In an action of trespass on lands, an issue is sufficient which has afforded the excepting party an opportunity of having the jury assess any damages for any trespass that the opposing party may have unlawfully committed. *Hutton v. Horton,* 549.

JUDGMENTS. See Contempt, 1; Appeal and Error, 17, 19, 27, 29, 35, 39; Clerks of Court, 2; Trusts, 7; Mortgages, 20; Estoppel, 2; Drainage Districts, 3.

1. *Judgments—Regular—Course and Practice of Court—Motions—Statutes.*—In a suit to set aside certain deeds alleged to be void and to declare plaintiff the owner of the title to lands, a judgment by default is regularly entered when the defendant has failed to file an answer within the statutory time, and the summons has been duly served. Rev., sec. 556 (4). *Jernigan v. Jernigan,* 84.

2. *Judgments—Motions—Neglect—Notice—Statutes—One Year—Computation of Time.*—The defendant in an action is fixed with notice, at the time of service of summons, that a judgment by default may be taken against him for failure to answer in the due course and practice of the courts, but not of the fact that such judgment has been entered until the day of its rendition. Hence, a motion to set aside such judgment for mistake, surprise, and excusable neglect is made within

JUDGMENTS—*Continued.*

the statutory time if within one year from the date such judgment was rendered (Rev., sec. 513), the provisions of Rev., sec. 573, as to judgments, etc., relating to the first day of the term of court at which they were rendered, not applying in such cases. *Ibid.*

3. *Judgments—Default and Inquiry—Cause of Action—Evidence—Express Companies—Carriers of Goods—Bills of Lading—Contracts.*—A judgment by default and inquiry establishes the plaintiff's right to recover damages, and his cause of action upon the subsequent trial, and where the defendant is an express company, a provision in its bill of lading or contract of carriage, offered in evidence for the purpose of defeating plaintiff's cause of action, is properly rejected by the court. *Mitchell v. Express Co.*, 235.

4. *Judgments—Unsigned—Statutes Directory.*—An unsigned judgment passed in open court and filed with the papers in the case as a part of the judgment roll is valid, the requirement that it should be signed by the judge being only directory. *McDonald v. Howe*, 257.

5. *Judgments—Subsequent Term—Nunc Pro Tunc.*—Judgment may be entered at a succeeding term of the court, *nunc pro tunc*, in proper instances. *Ibid.*

6. *Judgments—Default—Trial—Pleadings.*—Upon allegations in the complaint of defendant's express promise to pay a definite sum of money, a judgment by default final upon failure to answer, in plaintiff's favor, is regularly entered. *Montague v. Lumpkins*, 270.

7. *Same—Motions to Set Aside—Affidavits—Allegations—Presumptions.*—To set aside a judgment by default for the want of an answer it is necessary to allege matters which, if true, will establish a defense, the presumption being in favor of the judgment. *Ibid.*

8. *Same—Contracts—Quantum Meruit—Damages.*—A judgment by default final for want of an answer was rendered on a contract for the sale of leaf tobacco at stated price upon the delivery of several different grades, the entire purchase price being $1,000, if it should weigh 3,000 pounds, "but if less, only $900": *Held*, the contract will be construed as a whole to effectuate the intent of the parties, as a matter of law, and thus construed it appears that the defendant has sold his entire crop of tobacco, with the presumption that the contract of sale provided for the different contingencies, and against a *quantum valebat* as to the purchase price; and an affidavit upon a motion to set aside the judgment, in effect denying that the plaintiff had delivered as much as 3,000 pounds of the tobacco, is insufficient. *Ibid.*

9. *Judgments— Default— Trial—Motions—Affidavits—Damages—Attorney and Client.*—Upon motion to set aside a judgment by default final, for the want of an answer rendered upon a contract for the sale of so many pounds of leaf tobacco at a stated price, the affidavit of the defendant's attorney set forth among other things that the tobacco

JUDGMENTS—*Continued.*

delivered to the defendant was in such damaged condition as to greatly decrease its value, and was not up to the quality that it was in at the time of the purchase, etc.: *Held*, too indefinite, for it does not show that the plaintiff was not responsible for the damages; and further, insufficient as coming only from the attorney, who could only speak by hearsay. *Ibid.*

10. *Judgments—Set Aside—Excusable Neglect.*—Where a defendant, known as "The Pintsch Gas Company," has been sued in that name, and failing to answer, a judgment by default and inquiry after the lapse of several years has been taken, and final judgment upon the inquiry thereafter regularly entered, and it thereafter appears that the true name of the defendant was the "Pintsch Compressing Company," but that the summons had been duly forwarded to the president of the "compressing company," who had employed local attorneys to represent his company from the beginning, the judgment may not be set aside for excusable neglect. *Gordon v. Gas Co.*, 435.

11. *Judgment—Correction—Statutes—Motions—Abatement.*—Where a defendant company has transacted business in a locality as the "Pintsch Gas Company," but is in fact the "Pintsch Compressing Company," it may not knowingly conceal its real name until after judgment by default and inquiry has been regularly prosecuted to final judgment, and then successfully resist a judgment on a motion to correct the pleadings, process, and judgment. Rev., 507, his remedy being by motion to abate the action. *Ibid.*

12. *Judgments—Estoppel—Executors and Administrators—Sales—Partnerships.*—Certain farm products owned by the deceased and his administrator were sold at private sale by the latter, under an order of court: *Held*, the question of ownership of the products, or the separate property right of the administrator therein, was not included in the adjudication of sale, and the order does not operate as an estoppel in a subsequent action by the administrator to recover his share of the purchase price. *Price v. Edwards*, 494.

13. *Judgments—Records—Estoppel—Parties—Privies.*—A court record of an action or proceeding, considered as a memorial of a judgment, imparts absolute verity, and may be collaterally impeached by no one; and the judgment itself has the further effect of precluding a reëxamination into the truth of the matters decided, and is binding upon the parties to the proceedings and their privies, the further and secondary effect of the record considered as a judgment being an estoppel upon them as *res judicata*. *Ibid.*

14. *Judgment—Credits—Execution Suspended—Reference.*—Where, under claim and delivery in an action, plaintiff has seized personal property of the defendant, including certain notes, which should have been allowed as a credit to the defendant by the referee, but not considered by him, though the question had been raised by the defendant's pleadings and exceptions, the execution on the judgment confirming the report adverse to defendant will be suspended until the proper amount of the credit can be ascertained and given. *Smith v. French*, 141 N. C., 1, cited and approved. *Cooper v. Hair*, 657.

JUDGMENTS—*Continued.*

15. *Judgments—Consent—Attorney and Client—Questions for Jury—Trials—Evidence.*—Whether an attorney had been authorized to enter a compromise judgment by his client is ordinarily a question of fact for the jury to determine. *Joyner v. Fiber Co.*, 634.

JURISDICTION. See Bigamy, 1; Venue, 1; Clerks of Court, 1, 3; Courts, 1, 2; Copyright, 2; Railroads, 5; Removal of Causes, 1, 3; Criminal Law, 8.

JURORS. See Indictment, 1; Instructions, 1; Insurance, Life, 1.

Jurors—Discharge—Statutes—Courts—Terms—Improper Remarks—Presumptions.—Under the statute, the jury, for one week of a term of court, are discharged, and do not try the cases of the following week thereof; and the remarks of the judge in sentencing a prisoner during the former week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week. *S. v. Baldwin*, 688.

JUSTICES OF THE PEACE. See Courts, 2.

KIDNAPPING. See Criminal Law, 10.

LABORERS. See Materialmen, 1.

LANDLORD AND TENANT. See Estoppel, 1.

Landlord and Tenant—Safety of Leased Premises—Landlord's Duty to Repair—Express Promise—No Implied Promise—Negligence.—There is no implied promise on the part of the landlord as to the safety of the house on the leased premises for occupancy, or duty to make repairs, and where the evidence tends only to show that the plaintiff lived for several years in the house, and was injured by the front porch rail giving away while she was leaning thereon and throwing her to the ground, by reason of its having been fastened with smaller nails than should have been used, in the absence of a special agreement of the landlord to repair or remedy the defect, or of evidence to show he had previous knowledge thereof, a judgment of nonsuit is properly allowed, although the plaintiff had previously called attention of the defendant's agent to the general state of disrepair of the building, which the agent refused to repair under the defendant's instructions. *Fields v. Ogburn*, 407.

LARCENY. See Indictment, 3, 4; Instructions, 14; Appeal and Error, 58.

1. *Larceny—Indictment—Description—Refinements—Statutes—Criminal Law.*—An indictment charging larceny of lumber at a certain place, and the name of the owner, is sufficient to identify the property, show it was of value, and protect the defendant on another charge of the same offense, the former technicalities or refinement of the law being now abolished. Rev., 3254. The procedure being for the defendant to apply for a bill of particulars if he desires more definite information. Rev., 3244. *S. v. Caylor*, 807.

2. *Larceny—Definition—Criminal Law—Instructions—Appeal and Error—Reversible Error.*—Larceny is the wrongful taking of the property of another with the intent to permanently deprive the owner, by the taker's converting it to his own use or for the benefit of a third

LARCENY—*Continued.*

person; and a charge to the jury that the intent is not an essential element of the offense, but that depriving the owner of the possession is sufficient, or that feloniously, in this sense, is doing an unlawful act willfully, is prejudicial and reversible error. *S. v. Kirkland*, 810.

LEASES. See Mortgages, 11.

LEGAL TENDER.

Legal Tender—Waiver—Burden of Proof.—A check is not a legal tender of the contract price, and will not have the effect of such, unless such tender is waived by the other party, with the burden of proof on the party claiming it. *Lumber Co. v. Privette*, 37.

LEGISLATIVE CONTROL. See Municipal Corporations, 11.

LEGISLATIVE DISCRETION. See Constitutional Law, 25.

LEGISLATIVE POWERS. See Wills, 23.

LESSOR AND LESSEE. See Removal of Causes, 4; Railroads, 6; Contracts, 22, 23, 24.

LIBEL AND SLANDER.

1. *Libel and Slander—Slander—Publication—Evidence—Education—Conversion—Actions.*—The defendant, owner and publisher of a newspaper, published an article therein charging that the plaintiff, county chairman of the board of education, had no right to pay out of the county school fund his expenses to the State Teachers' Assembly, and, upon plaintiff's request to publish his proofs, he printed affidavits of his codefendants, officers of the bank of deposit of such funds, that the bank had paid vouchers to the plaintiff stating on their face they were for the said purpose. Upon the trial for slander it was shown that no such vouchers had ever been issued: *Held*, the exhibition of the affidavit to the notary before whom it was sworn, and to the owner of the newspaper that published it, was a publication by the defendants, officers of the bank, and giving it to the publishers was evidence of the purpose and intent to circulate it, which, in effect, charged the conversion of the county's funds to the plaintiff's own use in violation of law, and thereupon an action for slander against them will lie. *Lewis v. Carr*, 578.

2. *Libel and Slander—Slander—Qualified Privilege—Malice—Presumptions—Evidence.*—Publishing, or causing to be published, affidavits which in effect charges a public officer with appropriating public funds for his own expenses contrary to law, is qualifiedly privileged, and raises the presumption that the publication was *bona fide;* and though the falsity of the charge would not of itself prove malice, there is evidence thereof sufficient to go to the jury where the defendants were in a position to know at the time that the charge was false, by their connection or presumed knowledge, or where such knowledge was readily accessible to them. *Ibid.*

3. *Libel and Slander—Slander—Education—Misappropriation of Funds—Embezzlement—Statutes.*—Under the provisions of Rev., 4141, the chairman of the county board of education is not required to attend the

LIBEL AND SLANDER—*Continued.*

State association of county superintendents, their only allowance being two dollars per day and mileage, Rev., 2786, and a published charge that he had attended the State association and had taken his expenses thereof from the county funds is a charge of a breach of official duty, misconduct, and conversion of the public funds, and, *semble*, of embezzlement. *Ibid.*

4. *Libel and Slander—Slander—Publication—Common Purpose—Parties—Misjoinder—Statutes.*—Where two persons make an affidavit of a libelous character which is published according to their common purpose, in a newspaper, by a third, all three unite in the libelous words, and may be sued in the same action for the libel, and it may not be dismissed for misjoinder. In this case no objection for misjoinder was taken either by answer or demurrer, and under Rev., 474 (5), 476, 478, a motion to separate, and not to dismiss, is required. *Ibid.*

LICENSE. See Taxation, 9, 11; Municipal Corporations, 10.

LIENS. See Vendor and Purchaser, 4; Estoppel, 1; Materialmen, 1, 3; Mortgages, 20; Drainage Districts, 3.

Liens—Materialmen—Laborers—Principal and Surety—Contractors' Bonds—Municipal Buildings.—The policy of our law with respect to mechanics' and laborers' liens upon buildings being built, etc., as evidenced by our statutes and decisions thereon, is to give protection to creditors of this class by remedying defects found in existing laws; and the Laws of 1913 and 1915, Gregory's Supplement to Pell's Revisal, sec. 2020-A, p. 2019, expressly provides for laborers and materialmen a right of action against the surety on the contractor's bond for the erection of a municipal building, and any provision incorporated in bonds of this character that takes away this right are contrary to our public policy and the express provisions of our statute, and void. *Ingold v. Hickory*, 614.

LIMITATIONS. See Constitutional Law, 4; Wills, 5, 8, 13; Taxation, 10; Principal and Agent, 4.

LIMITATION OF ACTIONS. See Deeds and Conveyances, 18, 20; Taxation, 3, 6; Husband and Wife, 8; Wills, 23; Pleadings, 10.

1. *Limitation of Actions—Wills—Codicils—Probate.*—Codicils to a will may not be caveated more than seven years after the will with the codicils have been admitted to probate before the clerk. Rev., sec. 3155. *In re Will of Parham*, 106.

2. *Limitation of Actions—Adverse Possession—State—Color—Admissions—Instructions.*—Where the plaintiffs claim the title to the lands in controversy under a grant from the State and *mesne* conveyances under which a life estate is reserved to the enterer, and it appears that the enterer remained in possession as life tenant to within seven years next preceding the commencement of the action, and that the adverse possession of the defendant under which he claimed commenced after the falling in of the life estate: *Held*, such adverse possession could not begin to run against the paper title of the plaintiff until the falling in of the life estate, and that the plaintiff was

LIMITATION OF ACTIONS—*Continued.*

entitled to recover unless the defendant showed by the greater weight of the evidence such previous adverse possession as would take the title out of the State, and would ripen it against the plaintiff's title either without or with "color."

The case of *Logan v. Fitzgerald,* 87 N. C., 308, distinguished and *Simmons v. Davenport,* 140 N. C., 407, approved as to rule that if fuller instructions are desired a request for them must be made. *Baggett v. Lanier*, 130.

3. *Limitation of Actions—Adverse Possession—Color of Title—Instructions.*—Upon the question of adverse possession under color to ripen title to lands, where there is evidence that the claimant had been in such possession for seven years or more, and the judge has so stated the contention, an instruction by the court that they should find for the claimant if they so found the facts, is not equivalent to an instruction that he must have been in possession for more than the seven years, but only that it must have continued for that period as the minimum one. *Singleton v. Roebuck,* 202.

4. *Limitation of Actions—Tax Deeds—Adverse Possession—Evidence—Equity—Actions—Cloud on Title.*—Where the purchaser of land, under a tax deed for the nonpayment of taxes has used the land for such purposes as it was capable of for seven years under his deed, and his title has been ripened into an absolute one by such adverse possession, he may not be ousted therefrom upon the allegation that the relief sought is to remove a cloud upon the plaintiff's title. *Ruark v. Harper*, 250.

5. *Limitation of Actions—Trusts—Cestui Que Trustents.*—Under the facts of this case it is *held*, that where a substituted trustee for an executor under a will is barred by the statute of limitations, the *cestuis que trustent* are also barred. *Hayden v. Hayden*, 260.

6. *Limitation of Actions—Adverse Possession—Remainders.*—The statute of limitations against the remaindermen does not begin to run until the falling in of the estate of the life tenant, and his possession is not adverse to the remainderman, within the terms of the statute. *Barnhardt v. Morrison*, 563.

7. *Limitation of Actions—Contracts—Fraud—Discovery—Statutes.*—Where an action for damages will lie for fraud in inducing the purchasing of land at an excessive price, the three-year statute of limitations is applicable and will begin to run from the time the fraud was discovered, or should have been discovered, under the rule of the prudent man. *Morrison v. Hartley*, 618.

8. *Limitation of Actions—Cause Accrued—Mental Incapacity—Trusts—Evidence.*—The statute of limitations on a note begins to run from the time the cause of action thereon accrues, Rev., 169, and when it has once commenced, it is not suspended because of the payee's mental incapacity thereafter; and in this case it is *Held*, that there was no evidence of a trust relation between the parties that would affect the

LIMITATION OF ACTIONS—*Continued.*

operation of the statute, or require a demand for payment by the payee's administrator. *White v. Scott*, 637.

9. *Limitation of Actions—Telegraphs—Railroads—Rights of Way—Superimposed Burdens—Damages.*—The three-year statute of limitations, Rev., 395 (3), applies to an action by the owner of the land to recover damages against a telegraph company for erecting and maintaining a line of telegraph poles and wires thereon, and within the right of way theretofore acquired by a railroad company, such occupation, as between the parties, being wrongful, and presumed to be of a permanent or continuing nature. *Teeter v. Tel. Co.*, 172 N. C., 783, cited and approved. This action was commenced within three years after the entry upon the land. *Query v. Tel. Co.*, 639.

LIVESTOCK. See Trespass, 1.

"LOAN." See Wills, 6.

LOCAL ACTS. See Constitutional Law, 3.

LOTTERIES.

1. *Lotteries—Definition.*—A lottery is defined to be any scheme for the distribution of prizes, by lot or chance, by which one paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. *S. v. Lowe*, 770.

2. *Lotteries—Games of Chance—Selling Devices.*—By the use of a machine called a "merchandise vendor," cards were arranged in several parallel columns, each one calling for the sale of a collar button at five cents each. Every twentieth card called also for a fifty-cent box of candy. By operating a crank each purchaser received a card good for the collar button, and at every twentieth card he was entitled to a fifty-cent box of candy besides. The machine was so arranged that the operator could not tell whether he would receive only the collar button for which he had paid, or in addition, the candy: *Held*, the device was a gambling one within the intent and meaning of our statute, the chance being as to who would draw the twentieth card and receive the candy in addition to a collar button, which all received. *Ibid.*

3. *Same—Small Values.*—The fact that a gambling device is for small values does not relieve it of its objectionable features, for upon the same principle one involving large amounts may be operated. It is the element of chance that makes it pernicious to public morals, which it is the object of our statute to prevent, and for this reason it is condemned. *Ibid.*

LUNATIC. See Constitutional Law, 1.

LYNCHING. See Criminal Law, 6, 7, 8, 9.

MALICE. See Libel and Slander, 2; Homicide, 6.

MALPRACTICE. See Instructions, 10.

MANDAMUS. See Constitutional Law, 14; Schools, 3; Statutes, 9.

MANDATORY. See Statutes, 5, 6.

MAPS. See Deeds and Conveyances, 17.

MASTER AND SERVANT. See Employer and Employee; Evidence, 2; Railroads, 4; Instructions, 10.

MATERIALMEN. See Liens.

1. *Materialmen—Liens—Principal and Surety—Contracts—Breach—Statutes.*—The surety on a contractor's bond, to the effect that the contractor shall complete the building of the owner in accordance with the builder's contract, plans and specifications, supply and materials, etc., therefor, and fully reimburse the owner for all outlay and expenses he may incur by reason of the contractor's default, cannot be held liable by the owner for the claim of a materialman, when the contractor has completed the contract according to its terms, the building has been accepted by the owner, and he has paid the contractor a balance due him, under a full statement of the amounts then owing on the building. Rev., 2021. *Mfg. Co. v. Holladay*, 417.

2. *Same—Principal and Agent.*—Where the contractor for the erection of a building has completed it according to the terms of his contract with the owner, has given him a full statement of the various items owing on the building (Rev., 204), and thereupon the owner has voluntarily paid him the balance of the full contract price, the surety on the contractor's bond given to the owner to save the latter harmless in the event of the contractor's default in so completing the contract, is not liable to the owner for the account of an unpaid materialman, for such payment of the owner was in violation of his statutory duty to pay the materialman, and having trusted the contractor to do this for him, the latter acted as his agent, for whose failure to pay the claim the owner is responsible. *Ibid.*

3. *Materialman—Liens—Contracts—Statutes—Principal and Surety.*—The requirement of Rev., 2021, that the contractor furnish the owner of the building being constructed a statement of persons and amounts he owes for materials, when complied with, makes it the duty of the owner to retain from the amount then due the contractor, so far as it extends, the amounts due by the latter to the materialmen, and pay it to them, and under ch. 150, sec. 4, Laws 1913, no payment to the contractor after such notice shall be a credit on or discharge of the lien provided for the materialmen, etc.: *Held*, these statutes become a part of the building contract, and while enacted primarily for the benefit or protection of the workmen and materialmen, it is also for the protection of the owner and the surety on the contractor's bond. *Ibid.*

4. *Same—Advantage of Wrong—Equity.*—Where the owner voluntarily pays to the contractor, after the completion and acceptance of his building, the full balance of the contract price, having received the contractor's statement of persons and materials still owed by him thereon (Rev., 202), his conduct in so doing is wrongful to the materialmen, of which he will not be permitted to take advantage to the loss of the surety on the contractor's indemnifying bond, in his action to recover thereon. *Ibid.*

MEMORANDA. See Evidence, 21.

MENTAL ANGUISH. See Telegraphs, 3, 4.

MENTAL INCAPACITY. See Limitation of Actions, 8.

MERCHANDISE. See Vendor and Purchaser, 6, 8; Parties, 3; Statutes, 14.

MISJOINDER. See Libel and Slander, 4.

MISSTATEMENT. See Appeal and Error, 58.

MISTAKE. See Deeds and Conveyances, 16.

MOB. See Criminal Law, 9.

MONOPOLY.

Monopoly—Evidence—Injunction.—In this cause to restrain a private sale of a public utilities by the city authorities to an electrical power plant with a grant of a municipal franchise, there is no evidence that the purchaser would acquire a monopoly. *Allen v. Reidsville*, 514.

MORTGAGES. See Deeds and Conveyances, 1; Drainage Districts, 2, 3; Pleadings, 1; Waiver, 1; Injunctions, 2; Appeal and Error, 6; Principal and Agent, 1; Constitutional Law, 19; Trusts, 7; Clerks of Court, 2.

1. *Mortgages—Crops—Descriptive Words, "Etc."—Vendor and Purchaser.* A mortgage by the cropper of his "Irish and sweet potatoes, corn, etc.," grown on his land, sufficiently identifying the lands, is sufficient to include cotton raised thereon, the words "etc." or "et cetera" meaning other crops, especially when it is further described as "being one-half the crop grown on said lands"; and when the mortgage has been registered in the proper county the mortgagee may recover them from the purchaser of the mortgagor. *Gallop v. Milling Co.*, 1.

2. *Mortgages—Sales—Deceased Mortgagor.*—The sale, in pursuance of the power contained in a mortgage made by husband and wife of the latter's lands, after the death of the principal mortgagor, the wife, is properly made. *Lipsitz v. Smith*, 98.

3. *Same—Devisees—Parties.*—Where the mortgagee has sold the lands of the wife according to a power of sale therein, after the death of the wife, the devisees of the wife are the proper and usually sufficient parties in a suit involving the distribution of the surplus. *Ibid.*

4. *Mortgages—Sales—Surplus Funds—Deceased Mortgagor—Devisees—Suits—Interpleader.*—Where the mortgagee of lands sells the same under the power of sale contained in the instrument, after the death of the mortgagor, and has a surplus fund in his hands for distribution among her devisees, among whom there is a *bona fide* dispute as to the amount each should receive, the mortgagee may maintain a suit to protect himself in paying over the surplus to the distributees until the correct proportion is determined by the court, in the nature of an original bill of interpleader under the old system, showing that he has the fund in his possession and his readiness to pay it into court as a jurisdictional or essential averment, and the court may make proper orders for its care and supervision. *Ibid.*

MORTGAGES—*Continued.*

5. *Mortgages—Powers—Deeds and Conveyances—Sales of Land—Irregularities—Notice.*—Where a *bona fide* grantee of lands has acquired them from a purchaser at a mortgage sale, under a power contained in the mortgage, with no vitiating facts appearing in his chain of title, and without notice of any irregularity of sale or otherwise that would avoid it, his deed is good in respect thereto. *Brewington v. Hargrove*, 143.

6. *Mortgages—Advertisement—Sales—Deeds and Conveyances—Recitals—Prima Facie Evidence—Burden of Proof.*—The recital in a deed to lands sold under a power of sale contained in a mortgage that due advertisement as required by the mortgage and the law had been made, is *prima facie* evidence of the fact, and places the burden of proof upon the party to the action claiming otherwise. *Ibid.*

7. *Mortgages—Powers—Sales—Advertisements—Defects—Mortgagor's Acquiescence—Deeds and Conveyances.*—The acquiescence of the mortgagor of lands at a sale of his lands under a power contained in his mortgage will cure any defect therein as to the advertisement by notice "at the courthouse door and three other public places." *Ibid.*

8. *Mortgages—Sales—Advertisement—Date of Sale—Presumptions—Postponement—Deeds and Conveyances.*—Where the advertisement for the sale of lands under mortgage is for a certain date, and the recital in the purchaser's deed is that it took place two days later, the presumption is that it was legally postponed for that time, and in the absence of rebuttal evidence, it will be held valid in that respect. *Ibid.*

9. *Mortgages—Assignment—Advertisement—Sales—Legal and Equitable Interests.*—The mortgagee of land assigned his rights thereunder to a third person, and they both advertised according to the power of sale contained in the mortgage, and sold the land thereunder: *Held*, as both the holder of the legal title and the holder of the equitable title concurred and united in giving the notice and making the sale, there is no defect in the execution of the power that could affect the title of the purchaser. *Ibid.*

10. *Mortgages—Sales—Executors and Administrators—Statutes.*—The personal representative of the deceased mortgagee or trustee of lands is vested with statutory authority to foreclose in accordance with the power of sale contained in the instrument. Rev., sec. 1031. *Ibid.*

11. *Mortgages—Contracts—Leases—Sawmills—Payment—Title.*—A contract in relation to a sawmill, called therein a lease, upon consideration that the bargainee shall cut or manufacture timber for the bargainor at the rate of one dollar per thousand feet, and when a specified sum has been accordingly paid it shall be treated as the purchase price of the mill, which shall then be the property of the bargainee, is to be considered in its effect as a mortgage, and upon his having complied therewith the title to the mill vests in him and the property becomes his as a purchaser. *Guy v. Bullard*, 228.

12. *Same—Assignment—Waiver—Consent—Assignee's Rights.*—A contract made for the purchase of a sawmill upon consideration of the purchaser's sawing or manufacturing a certain number of feet of lumber for the seller, which does not in express terms or by fair intendment

MORTGAGES—*Continued.*

import reliance on the skill, character or personal qualities of the purchaser for performance, is assignable by him, and upon compliance by his assignee with its terms such assignee becomes the purchaser; and where the original seller has knowingly accepted payments from him his conduct therein will amount to a consent or waiver, were the contract of a nonassignable character. *Ibid.*

13. *Mortgages — Contracts — Stipulations—Right to Repossess—Waiver.*—Where the mortgagee of a sawmill permits the mortgagor to continue to use the same, and afterwards the latter fully pays off the mortgage debt, he may not then avail himself of a provision in the instrument under which he may, at one time, have repossessed the mortgaged property. *Ibid.*

14. *Mortgages—Tender—Payment Into Court.*—An unaccepted tender by the mortgagor of the amount due the mortgagee on the mortgage debt is insufficient, though properly made, unless the tenderer shows his ability, readiness and willingness to pay the money when tendered and brings it into court when he sues to redeem. *Debnam v. Watkins*, 238.

15. *Mortgages—Sales—Mortgagor a Bidder—Tender—Waiver—Estoppel.*—A mortgagor of lands, who attends the sale made under the power contained in the mortgage, and, remaining silent, becomes a competitive bidder, though he has a right to buy in the property in protection of his title, is estopped *in pais* as against the purchaser to set up an unaccepted tender theretofore made to the mortgagee after the maturity of the note secured by the instrument; and his silence with knowledge of his right, under such circumstances, will be construed as a waiver of the right claimed, if any he may have had. *Ibid.*

16. *Mortgages—Chattels—Sales—Presence of Property—Void Sales—Accounting—Market Value.*—The foreclosure of a chattel mortgage under the general power of sale ordinarily appearing in such instruments, requires that the property should be sold "with such reasonable care as would produce the best results," and is likened, in some respects, to sales under execution, wherein the property must be present at the time or place of sale, or so near as to afford the bidders an opportunity to examine it and make some estimate of its worth; and when the sale is not accordingly made, the mortgagor or those claiming under him may by his action have it declared void, and hold the mortgagee to account for its market value, unless the former has expressly assented to such sale or in some way has waived his rights concerning it. *Nance v. King*, 574.

17. *Same—Pleadings—Counterclaim.*—Where the mortgagee has taken personal property subject to his mortgage in his action of claim and delivery, and has sold the same under the power of sale contained in the mortgage, but contrary to law by not having the property present at the sale, the defendant mortgagor may set up by counterclaim his right to have the sale declared void, and hold the mortgagee responsible for an accounting for the market value of the property so sold. *Ibid.*

18. *Mortgages—Sales—Void Sales—Evidence—Market Value.*—Where a mortgagee is held accountable for the market value of personal prop-

MORTGAGES—*Continued.*

erty, he sold under a sale void for noncompliance with the law, an answer to a question, "What was the property worth at the time of the seizure—its reasonable market value?" is not objectionable on the ground that it was testimony of the worth of the property, and not its market value, the answer necessarily being the market value of the property. *Ibid.*

19. *Same—Principal and Agent.*—Where a mortgagee is held accountable to the mortgagor of personal property for its market value under a void sale under the power in the instrument, testimony of the bidder for the purchaser at the sale that he had offered to return the property on the payment of the mortgage is incompetent, when it is not shown that the agent for the purchaser had authority to carry the offer into effect, or the condition of the property at the time of the offer, or its deterioration. *Ibid.*

20. *Mortgages—Sales—Void Sales—Liens—Credits—Judgments.*—The plaintiff in the action seizes under claim and delivery personal property subject to his own first mortgage, and to a second mortgage held by another, sold the same under a void sale, satisfied his own lien, and paid the balance of the purchase price on the second mortgage lien. The defendant mortgagor set up and recovered upon a counterclaim that the market value was in excess of the two liens: *Held*, there was nothing to the plaintiff's prejudice in the judgment allowing him a credit for the amount he had paid on both the mortgages. *Ibid.*

MOTIONS. See Attachment, 1; Removal of Causes, 1, 4, 5; Appeal and Error, 5, 27, 37; Judgments, 1, 2, 7, 9, 11; Employer and Employee, 1; Negligence, 2; Railroads, 5; Evidence, 1; Indictments, 2.

Motions—Proceedings—Irregularity—Collateral Attack—Actions.—The recitals in a deed of a commissioner appointed by the court to sell lands are *prima facie* sufficient to show his authority to do so (*Irvin v. Clark*, 98 N. C., 437), and the proceedings wherein it was made may not be attacked collaterally for irregularity, but only by motion in the cause to have the judgment therein set aside. *Rackley v. Roberts*, 147 N. C., 201, cited and approved. *Baggett v. Lanier*, 129.

MOTIVE. See Homicide, 19; Evidence, 33.

MUNICIPAL BUILDINGS. See Liens, 1.

MUNICIPAL CORPORATIONS. See Constitutional Law, 5, 6; Taxation, 10, 11; Appeal and Error, 4, 23; Railroads, 3; Counties, 6; Negligence, 1; Statutes, 10, 12, 17; Elections, 1, 2; Contracts, 17.

1. *Municipal Corporations—Cities and Towns—Railroads—Bridges.*—Under its police powers and the statutes applicable, a city government has the right to require railroad companies to construct bridges for streets running over their tracks. *Powell v. R. R.*, 243.

2. *Municipal Corporations — Counties — Towns — Highways — Streets — Bridges—Actions.*—The incorporation of a town included in its limits existing county highways over which were two bridges that, since then, the county commissioners rebuilt of its own volition without the request or concurrence of the town. These highways were not city streets, though their maintenance were important to both the town

MUNICIPAL CORPORATIONS—*Continued.*

and county, but were never recognized as such by the town authorities, or control thereof assumed by them: *Held*, the county may not recover of the town the cost they had paid for rebuilding the bridges. The question of whether it was the duty of the county to build these bridges is not presented. *Comrs. v. Raeford*, 337.

3. *Municipal Corporations—Counties—Towns—Streets—Discretion—Necessity.*—Municipal corporations have the right, within their judgment of the necessity or expediency, to open public streets and to locate and construct necessary bridges over them. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Negligence—Bridges—Guards—Children—Questions for Jury—Nonsuit—Trials.*—A city having a bridge on its street across a stream some twenty feet below, the water rushing through a culvert with sounds to be heard on the bridge, and colored at times with many colors of dies emptying into it from neighboring mills, and where the neighborhood children had been accustomed to play upon the street for many years, had provided the bridge with two parallel pipes one and one-half inches in diameter, one about eleven inches above the bridge level and the other about eighteen inches above the first, as guards, and allowed it so to remain without sufficient protection to prevent children from passing between the pipe guards, or falling from between them, when looking upon the many-colored water, and the stream as it dashed beneath the bridge: *Held*, such conditions, being peculiarly attractive to the children that frequently the place, afforded, in the insufficiently protected railing of the bridge, evidence of the actionable negligence of the city, in an action to recover damages for the death of the plaintiff's intestate, a 28-months-old child, caused by its falling from the bridge upon its concrete foundation. *Comer v. Winston-Salem*, 383.

5. *Municipal Corporations—Cities and Towns—Waters—Surface Waters—Extraordinary Rains—Evidence—Instructions—Negligence.*—Where a city has been negligent in the construction of a street and maintaining a pipe it had laid in the ground under plaintiff's dwelling for carrying off the water, causing damage to the plaintiff's home, testimony that it was the result of a rainstorm of unusual size for that section of the country is not sufficient to sustain a requested instruction to find for the defendant if the damages were occasioned by an extraordinary rainfall in the community, the word "unusual," as to the character of the storm, implying that such storms had previously occurred, and not meeting the requirement that they may have not been reasonably anticipated in the future. *Shaw v. Greensboro*, 426.

6. *Same.*—Where there is evidence that on other occasions the plaintiff's dwelling had been damaged by the negligence of the defendant city in not properly providing for an overflow of surface water, a requested instruction to find under the evidence for defendant, if on one occasion the damages were caused by an extraordinary rainstorm, is properly refused. *Ibid.*

7. *Municipal Corporations—Cities and Towns—Waters—Surface Waters—Drains—Damages—Plaintiff Minimize Damages—Negligence.*—Where damage is sought by the plaintiff by reason of surface water flowing into his dwelling, caused by a hole in a drain pipe, which it was the

MUNICIPAL CORPORATIONS—*Continued.*

duty of the defendant city to have properly fixed and maintained, the plaintiff was not required to minimize his damage by fixing the pipe, at his own expense. *Ibid.*

8. *Municipal Corporations—Cities and Towns—Elections—Injunctions—Appeal and Error.*—Where an election has been held according to law to vote upon the question of the city selling one of its public utilities, a restraining order theretofore sought to prevent the holding of the election, presents a moot question that the Supreme Court will not decide on appeal, there being then nothing for the judgment to operate on. *Allen v. Reidsville*, 513.

9. *Municipal Corporations—Cities and Towns—Public Utilities—Sales—Admissions—Trials—Consideration—Fraud—Evidence.*—In an action wherein an injunction is sought against the private sale of a public utility by the city authorities, on the ground that the purchaser was to pay only thirty thousand dollars for it when another offered fifty thousand dollars, the sale will not be declared void for an admitted insufficient consideration, when other allegations of the defendants set forth such facts as would show that the citizens or the business interests of the city would be equally or more benefited if sold to the one with whom they had agreed. *Ibid.*

10. *Municipal Corporations—Cities and Towns—Ordinances—Statutes—Taxation—License—Criminal Law.*—Upon the prosecution of a criminal action for the violation of a city ordinance, Rev., 3702, the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. *S. v. Prevo*, 740.

11. *Municipal Corporations—Cities and Towns—Statutes—Ordinances—Legislative Control.*—Except when restricted by constitutional provision, municipalities, in the exercise of their governmental functions, are subject to almost unlimited legislative control, and a town ordinance in violation of a valid State statute on the same subject-matter is void. *Ibid.*

MUNICIPALITIES. See Constitutional Law, 7, 22; Taxation, 1.

MURDER. See Homicide; Indictment, 2; Appeal and Error, 50, 51.

MUTUAL MISTAKE. See Equity, 2, 3.

NAVIGABLE WATERS. See Entry, 1.

NECESSARIES. See Counties, 1, 2; Trusts, 4.

NECESSITY. See Municipal Corporations, 3.

NEGLECT. See Judgments, 2.

NEGLIGENCE. See Employer and Employee, 2, 5, 6, 7, 8, 10, 11; Evidence, 2; Instructions, 10; Carriers of Goods, 2, 3, 5, 6, 7, 8, 9, 18, 19, 21; Employer and Employee, 3; Corporations, 1; Damages, 3; Municipal Corporations, 4, 7; Carriers of Passengers, 3; Landlord and Tenant, 1; Telegraphs, 5; Physicians and Surgeons, 1.

NEGLIGENCE—*Continued.*

1. *Negligence—Parent and Child—Contributory Negligence—Evidence—Questions for Jury—Nonsuit—Trials—Municipal Corporations—Cities and Towns.*—The finding of the jury that the mother of the 28-months-old child was not guilty in contributing to the negligence causing the death will be upheld upon evidence tending to show that while the mother was busy about her household affairs, the deceased had gone off with her little friend, and a few minutes afterwards was killed by falling from a bridge with insufficient guard rails across a city street, near a children's playground, not far from her residence. *Comer v. Winston-Salem*, 383.

2. *Negligence—Automobiles—Parent and Child—Principal and Agent—Motions—Evidence—Nonsuit—Trials.*—In order to recover of the owner of a car damages caused by his daughter driving it at the time of the injury, there must be evidence that the daughter, experienced therein and more than twenty-one years of age, was acting as the agent of her father at that time, and where the evidence tends only to show that the daughter was acting solely for herself, and not in any manner for her father, the latter may not be held liable in damages; and a motion as of nonsuit is properly allowed. *Bilyeu v. Beck*, 481.

3. *Negligence—Issues—Contributory Negligence—Last Clear Chance—Burden of Proof—Trials—Instructions—Appeal and Error.*—Where, in an action to recover damages for a personal injury, the three issues of negligence, contributory negligence, and the last clear chance are involved, the burden is upon the plaintiff to show negligence and proximate cause under the first issue; and when this has been done, the burden is on the defendant to show plaintiff's contributory negligence under the second issue, and, under the third issue, the burden then shifts to the plaintiff to show that, notwithstanding his own negligence, the exercise by the defendant of ordinary care would have avoided the injury; and where the judge's charge applies the evidence so as to increase the burden on the first issue, and thereby unduly places a greater burden upon the plaintiff than the law requires, it is reversible error. *Lea v. Utilities Co.*, 509.

NEGOTIABLE INSTRUMENTS. See Banks and Banking, 3.

NEW CAUSE. See Pleadings, 10.

NEW PARTIES. See Removal of Causes, 5; Pleadings, 11.

NEW TRIALS. See Appeal and Error, 13, 46; Evidence, 9, 18; Criminal Law, 16.

NONRESIDENT. See Drainage Districts, 2.

NONSUIT. See Carriers of Goods, 3; Railroads, 5; Employer and Employee, 4, 5, 6; Contracts, 14; Evidence, 6, 25, 27, 31; Boundaries, 2; Negligence, 1, 2; Municipal Corporations, 4; Homicide, 1; Spirituous Liquors, 3; Criminal Law, 18; Appeal and Error, 59.

NOTICE. See Carriers of Goods, 5, 18; Drainage Districts, 1; Judgments, 2; Mortgages, 5; Constitutional Law, 17.

NUNC PRO TUNC. See Judgments, 5.

OBJECTIONS AND EXCEPTIONS. See Pleadings, 1; Trusts, 2; Appeal and Error, 3, 8, 11, 12, 17, 20, 21, 25, 26, 28, 32, 35, 36, 41, 42, 45, 49, 51, 52, 54, 55, 57, 58, 60; Instructions, 5, 6.

OFFSET. See Banks and Banking, 1.

OMISSIONS. See Appeal and Error, 50.

OPINIONS. See Evidence, 1, 10, 16; Homicide, 2.

OPTIONS. See Deeds and Conveyances, 9, 12; Injunctions, 3.

Options — Timber Contracts — Specific Performance— Evidence— Instructions—Questions for Jury—Trials—Equity.—In an action to enforce specific performance of an option to cut timber the evidence was conflicting as to whether the period of ten days for acceptance was extended to fifteen days. The evidence tended to show that a check for the amount was tendered the defendant within fifteen days, but after the elapse of ten days: *Held*, an instruction was erroneous, as invading the province of the jury, to find for the plaintiff if the jury found the facts to be as testified. *Lumber Co. v. Privette*, 37.

OPTIONAL. See Counties, 5.

ORDERS. See Appeal and Error, 6; Carriers of Goods, 16; Contracts, 17; Courts, 4.

ORDER, NOTIFY. See Vendor and Purchaser, 3; Carriers of Goods, 1.

ORDINANCES. See Appeal and Error, 4; Taxation, 13; Municipal Corporations, 10, 11.

OVERCHARGES. See Interstate Commerce, 2.

PARENT AND CHILD. See Habeas Corpus, 1; Negligence, 1, 2; Wills, 11.

PAROL EVIDENCE. See Contracts, 4; Evidence, 23, 24.

PAROL TRUSTS. See Trusts, 1, 2, 3, 5, 6.

PARTIES. See Injunctions, 2; Removal of Causes, 5; Torrens Law, 3, 5; Mortgages, 3; Executors and Administrators, 2; Carriers of Goods, 16; Judgments, 13; Actions, 3; Libel and Slander, 4; Drainage Districts, 3; Appeal and Error, 38.

1. *Parties—Deeds and Conveyances—Timber Deeds—Lands Subdivided—Price Proportioned—Appeal and Error—Procedure.*—The plaintiff sold the timber on his lands with an extension for cutting, etc., granted, for a certain price, and afterwards sold the lands, reserving his rights under the timber deed. The purchaser of the lands divided them into lots and the defendant became a purchaser of one of them, and claimed the right to cut the timber under his grantor's deed and the conveyance to his grantor: *Held*, while ordinarily the defendant, liable only for his proportionate part, has the right to require the other purchasers of these lots to be made parties in a suit to enjoin the further cutting of the timber and to recover the amount due under the timber contract, this does not apply when such other purchasers have not resisted the plaintiff's right and have made a satis-

PARTIES—*Continued.*

factory settlement with him; and upon the reversal of the defendant's appeal the ascertainment of the amount due by him will be ascertained in the Superior Court and judgment entered as the legal rights of the parties may require. *Ricks v. McPherson*, 155.

2. *Parties.*—Objection to the making of a new party to the action is waived, and will not be sustained when it has been done at the request of the objector. *Armfield v. Saleeby*, 299.

3. *Same—Trusts—Bankruptcy—Merchandise—Sales in Bulk.*—A trustee in bankruptcy for the seller is a proper party to an action to set aside a sale in bulk as being contrary to the statute. *Ibid.*

4. *Parties—Actions—Principal and Agent—Surplusage—Carriers of Goods—Express Companies.*—Where an agent of an express company knowingly receives as one shipment goods owned by two persons, and issues the bill of lading to one of them, in a suit for damages arising out of the transaction the one to whom the bill of lading was issued is regarded as the agent of the other, and making such other person a party plaintiff is not erroneous. *Pendergraph v. Express Co.*, 345.

PARTITION. See Interpleader, 1; Estoppel, 2.

PARTNERSHIP. See Judgments, 12.

1. *Partnership—Statutes—Assumed Names.*—The intent of chapter 77, Public Laws 1913, requiring that a partnership under an assumed name shall file a certificate in the office of the clerk of the Superior Court setting forth the name under which the business is conducted, with the full names and addresses of the persons owning and conducting it, etc., was to prevent fraud or imposition upon those dealing therewith, and to afford them means for knowing the status and responsibility of the concern with which they deal, and does not apply between partners who are presumed to know these conditions; and a surviving partner may maintain his action against the heirs of the dead one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted in the name solely of the dead partner, and the requirements of the statute had not been complied with. *Price v. Edwards*, 493.

2. *Same—Legitimate Business—Actions Between Partners.*—Whether a contract founded on an act in contravention of a statute is void without being expressly declared so depends in a great measure upon the intent of the statute, as disclosed by a proper interpretation; and where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves, chapter 77, Public Laws 1913, does not apply, and an action of the silent partner to recover his share of the assets from the other is not founded upon any wrong, and the principles relating to such transactions do not apply, or avoid his recovery. *Ibid.*

PATENTS. See Copyrights.

PAYMENTS. See Deeds and Conveyances, 4, 10, 12; Banks and Banking, 2; Injunction, 3; Taxation, 8; Mortgages, 14; Wills, 11.

PENALTIES. See Statutes, 15; Carriers of Goods, 15, 16.

PERSONAL PROPERTY. See Descent and Distribution, 3.

PETITIONS. See Removal of Causes, 3.

PHYSICIANS AND SURGEONS. See Instructions, 10; Employer and Employee, 8.

1. *Physicians and Surgeons—Diagnosis—Treatment—Negligence—Liability—Damages—Error of Judgment—Reasonable Doubt.*—A physician or surgeon only impliedly contracts to have the reasonable knowledge and capability and to use the known and reasonable means in the diagnosis and treatment of his patient, but does not guarantee a cure, and when so qualified, he is not liable in damages for an honest error in judgment in his diagnosis and treatment, committed within the stated rule. *Thornburg v. Long*, 589.

2. *Same—Diagnosis.*—In an action against a consulting physician to recover damages for pain and suffering of his client, evidence that a diagnosis and treatment for a different cause gave the relief sought, is sufficient upon which the jury could find that the defendant's diagnosis was the wrong one, but the evidence in this case is held insufficient for a recovery of damages on that ground, his diagnosis and treatment being according to a recognized and established practice. *Ibid.*

3. *Physicians and Surgeons—Diagnosis—Privilege—Communications.*—The communication of a wrong diagnosis of a patient's disease to his regular attending physician, by a consulting physician at whose instance he had acted, is wholly privileged, and not actionable in itself. *Ibid.*

PLEADINGS. See Attachment, 1; Removal of Causes, 5; Interpleader, 1; Contracts, 6; Deeds and Conveyances, 14; Judgments, 6; Courts, 1, 3; Carriers of Goods, 17; Appeal and Error, 21, 24, 29, 39; Mortgages, 17.

1. *Pleadings—Complaint—Cause of Action—Objections and Exceptions—Allegations—Mortgages—Registration—Vendor and Purchaser.*—An exception to the sufficiency of the complaint to state a cause of action may be taken, for the first time, in the Supreme Court, on appeal; but where the action is by the mortgagee to recover of a purchaser of the mortgagor goods sold subject to a registered mortgage, the allegation is unnecessary that the goods were sold subsequent to the registration of the instrument, though, in this case, it is *held* that the allegation that the mortgage was "duly registered" is sufficient *if* such allegation were necessary. *Gallop v. Milling Co.*, 1.

2. *Pleadings—Answer—Interpretation—Trusts—Conditions—Issues.*—Under our Code practice an answer must be liberally construed as a whole, and technical inaccuracy or lack of precision will not deprive the defendant of a defense, if any portion thereof presents facts sufficient, or if allegations of sufficient facts may be gathered from it, every reasonable intendment and presumption being in favor of the pleader; and where in one paragraph of the answer the defendant, trustee, in an action by the *cestui que trust*, admits having the trust fund and tenders it "whenever she executes" a certain deed, and consents to judgment against him therefor upon her executing this deed, in other paragraphs of the answer, it is sufficient to raise the

PLEADINGS—*Continued.*

issue as to the execution of the deed being a condition under which the defendant was required to pay over the trust funds. *Walker v. Woodhouse*, 57.

3. *Pleadings—Interpretation—Facts Alleged.*—A pleading, under the provisions of Rev., sec. 495, is to be liberally construed, with every intendment favorable to the pleader, and if any portion of it, or if it to any extent, presents facts sufficient to constitute a cause of action, or if such facts may be fairly gathered from it, however inartificially it may be drawn, or however uncertain, defective or redundant may be its statements, it will be construed as sufficient. *Dixon v. Green*, 205.

4. *Same—Deeds and Conveyances—Fraud—Undue Influence.*—In a complaint to set aside a deed for fraud or undue influence, the use of these words are not required for the sufficiency of the allegations, if it appear from the pleadings that the facts alleged are in themselves sufficient, by correct interpretation, to constitute the fraud or undue influence relied upon. *Ibid.*

5. *Pleadings—Answers—Inconsistent Defenses—Deeds and Conveyances—Undue Influence—Fraud.*—A defendant may plead contradictory or inconsistent defenses, as in this case, that she had not executed a deed for lands to the plaintiff, the subject of the controversy, and that if she had done so it was procured by fraud and undue influence, etc. *Ibid.*

6. *Pleadings — Demurrer — Frivolous — Courts — Discretion— Appeal and Error.*—The action of the trial judge in refusing to hold a demurrer as frivolous and allowing the defendant to plead over, except perhaps in the absence of a great abuse of this power, is within his sound legal discretion, and not reviewable on appeal. *R. R. v. Brunswick*, 254.

7. *Pleadings—Amendments—Courts—Statutes.*—The Superior Court has plenary power to allow an amendment to the complaint in an action on contract appealed from a justice of the peace. Revisal, 1476. *Pendergraph v. Express Co.*, 344.

8. *Pleadings—Title—Reversion—Estates.*—The plaintiff, the owner of a reversionary interest in lands, may maintain, under general allegation of his ownership of the fee, his action to remove, as a cloud upon his title, the wrongful claim of title by one in possession, without specific allegation as to his ownership in reversion, the general allegation of title being sufficiently broad to include his ownership in remainder, there being nothing in the form of the averment calculated to mislead the defendant, or take him by surprise. *Loven v. Roper*, 581.

9. *Pleadings—Allegations—Proof—Prayers for Relief.*—The plaintiff is entitled to recover upon the cause alleged and proved, and is not confined to the relief prayed for in his complaint. *Henofer v. Realty Co.*, 584.

10. *Pleadings—Amendments—Amplification—New Cause of Action—Limitation of Actions—Deeds and Conveyances—Shortage of Acres.*—Where the action is neither to correct a mutual mistake in a deed nor for

PLEADINGS—*Continued.*

decree for specific performance to convey land omitted therefrom, but to recover on a breach of the contract and bond for title the amount paid under mutual mistake for the shortage in acres sold by the acre, leave given the plaintiff to amend his complaint by alleging he was a nonresident and was unacquainted with the lands he was buying, and was without knowledge or opportunity to know of the deficiency, does not introduce a new cause of action, barred by the statute of limitations, but is only an amplification of the complaint to specify more particularly the cause of action. *Ibid.*

11. *Pleadings—New Parties—Supplementary Complaint—"Since Last Continuance"—Court's Discretion—Statutes.*—An employee sued a corporation to recover damages for an alleged negligent injury, and after pleadings filed it was announced in open court that a judgment had been agreed upon, apportioning the amount between the defendant and his indemnifying surety, not a party, but the surety objected to the amount apportioned therein to him on the eve of adjournment, and at the next term the court permitted the plaintiff to file a supplemental complaint, setting forth the agreement, in the nature of "a plea since last continuance," and ordering that the surety be made a party to the action: *Held*, the duty of the court to order all parties affected to be brought in (Revisal, 414), which is not appealable; and that the amendment, with the course taken, was a proper one and did not constitute a new cause of action. *Joyner v. Fiber Co.*, 634.

POLICIES. See Insurance, Life, 1.

POLICE REGULATIONS. See Carriers of Goods, 16.

POLL. See Indictment, 1.

POSSESSION. See Descent and Distribution, 2; Evidence, 8; Wills, 5; Actions, 2, 3; Intoxicating Liquor, 1; Spirituous Liquor, 1, 2, 3.

POSTMASTER. See Assumpsit, 1.

POWERS. See Township, 1; Mortgages, 5, 7; Wills, 12, 17.

PRACTICE. See Judgments, 1.

PRAYERS FOR RELIEF. See Pleadings, 9.

PRECATORY WORDS. See Wills, 9.

PREJUDICE. See Appeal and Error, 46.

PREMEDITATION. See Homicide, 9.

PRESUMPTIONS. See Instructions, 1; Banks and Banking, 2; Trusts, 3; Estates, 2; Appeal and Error, 9, 21, 44; Descent and Distribution, 1; Mortgages, 8; State's Lands, 2; Judgments, 7; Jurors, 1; Taxation, 6, 7; Evidence, 7; Wills, 10; Telegraphs, 5; Libel and Slander, 2; Intoxicating Liquor, 1.

PRIMARIES. See Appeal and Error, 18.

PRINCIPAL AND AGENT. See Attorney and Client, 2; Parties, 4; Copyrights, 1; Materialmen, 2; Negligence, 2; Mortgages, 19; Employer and Employee, 8; Spirituous Liquors, 4.

1. *Principal and Agent—Mortgages—Mortgagor and Mortgagee.*—Where the mortgagor and mortgagee of personalty agree that the former, in possession of the mortgaged property, shall dispose of the same in the ordinary course of trade, he is the agent of the mortgagee to the extent that he may pass the title to the goods sold in the usual way, freed from the mortgage lien, which implies authority to use the necessary means to that end. *R. R. v. Simpkins*, 273.

2. *Same—Undisclosed Principal—Banks and Banking—Carriers of Goods.* The cashier of a bank, as such, was the mortgagee of a certain lot of cotton seed, under a mortgage duly registered, which the mortgagor with his consent shipped "order, notify," and from whom the carrier took the shipment dealing with him alone as the person responsible for the freight, charging the amount to him and using a freight bill marked "freight prepaid." The bank took the draft, with bill of lading attached, for collection, collected the amount, crediting so much as was necessary to the mortgage debt, and placed the surplus, more than sufficient to pay the freight, to the mortgagor's credit, and after that had dealings with the mortgagor out of which it could have protected itself in the payment of the freight bill. For nearly three years no claim was presented to the bank by the carrier, and then the carrier sought to hold the bank liable as an undisclosed principal, when for the first time the bank had notice or knowledge of such claim: *Held*, neither the cashier nor the bank could be held, under the circumstances, as the undisclosed principal; and were it otherwise, the carrier is estopped in equity by its conduct and delay to enforce such claim. *Ibid.*

3. *Principal and Agent—Ratification—Evidence.*—In this case it is held that upon the material question of whether the principal had accepted a contract made in its behalf by its agent, there was sufficient evidence for the determination of the jury, that it had done so, not alone from the correspondence and other writings between the parties, but upon the oral evidence and consideration of their acts and conduct evidencing their mutual intent. *Storey v. Stokes*, 409.

4. *Principal and Agent—Scope of Authority of Agent—Secret Limitations—Evidence—Declarations.*—Secret limitations upon the authority of an agent to bind his principal contrary to the usual or apparent authority conferred upon agencies of like character, are not binding upon those dealing with such agent when unknown to them, and they are under no obligation to inquire into the agent's actual authority; and where they have dealt with the agent, relying upon his apparent authority in good faith, in the exercise of reasonable prudence, the principal will be bound by the agent's acts in the usual and customary mode of doing such business, though the agent may have acted in violation of his private instructions; but where the agent has acted beyond his apparent authority, his declarations of his authority to act may not be received as evidence against the principal, and the principal will not be bound thereby unless he has in some way ratified such act. *R. R. v. Smitherman*, 595.

PRINCIPAL AND AGENT—*Continued.*

5. *Principal and Agent—Scope of Authority—Agent's Declarations—Past Transactions—Evidence—Railroads—Station Agents.*—The local freight and passenger agent of a railroad company has no implied authority by virtue of such agency to surrender the possession of a part of its local depot or yards to the owner of the fee under his claim that the property had reverted, under his deed, to himself, by reason of its nonuser for general railroad purposes; and the declaration of the agent on a trial involving this question, that the railroad company, for which he was agent, had ceased to so use it are incompetent, and its admission is reversible error. *Ibid.*

6. *Principal and Agent—Commission—Evidence—Instructions.*—*Held*, this case involved only issues of fact as to whether the plaintiff was entitled to his commission on the sale of land for defendant, or whether the defendant had properly withdrawn the agency upon notice, and had sold the land himself; and it appearing that upon the evidence the judge had properly instructed the jury, no error is found. *Wright v. Shepard*, 656.

PRINCIPAL AND SURETY. See Materialmen, 1, 3; Liens, 1.

Principal and Surety — Debtor and Creditor — Security — Exoneration — Equity.—Where a creditor voluntarily parts with a security for his debt, the surety on the debtor's bond is exonerated to the extent of the value of the security he could have applied to the obligation. *Mfg. Co. v. Holladay*, 418.

PRINCIPAL FELON. See Criminal Law, 14.

PRIVITY. See Husband and Wife, 3.

PRIVIES. See Deeds and Conveyances, 3; Judgments, 13.

PRIVILEGE. See Libel and Slander, 2; Physicians and Surgeons, 3.

PROBATE. See Limitation of Actions, 1; Wills, 1, 20, 21, 22; Deeds and Conveyances, 20, 21.

PROCEDURE. See Parties, 1; Courts, 3; Motions, 1.

PROCESS. See Vendor and Purchaser, 5; Appeal and Error, 29.

PROFITS. See Contracts, 15, 22.

PROOF. See Pleadings, 9.

PROTEST. See Taxation, 8, 10, 13.

PUBLICATION. See Husband and Wife, 2; Libel and Slander, 1, 4.

PUBLIC OFFICERS. See Statutes, 12.

PUBLIC-LOCAL LAWS. See Constitutional Law, 22.

PUBLIC ROADS. See Courts, 3.

PUBLIC UTILITIES. See Municipal Corporations, 9; Statutes, 17; Elections, 1, 2.

PURCHASERS. See Injunction, 2; Torrens Law, 3; Deeds and Conveyances, 3; Wills, 14, 16, 18, 20, 21, 22; Trusts, 7.

QUANTUM MERUIT. See Judgments, 8; Contracts, 18.

QUESTIONS. See Appeal and Error, 20, 36, 45, 60.

QUESTIONS FOR COURT. See Slander, 1, 9.

QUESTIONS FOR JURY. See Slander, 1; Options, 1; Homicide, 1, 18; Carriers of Goods, 6; Boundaries, 2; Negligence, 1; Municipal Corporations, 4; Contracts, 9, 14, 24; Evidence, 29, 31; Employer and Employee, 8, 10; Indictment, 1; Judgments, 15; Criminal Law, 18.

RAILROADS. See State Lands, 1; Employer and Employee, 5; Removal of Causes, 4; Municipal Corporations, 1; Evidence, 10, 11, 12; Instructions, 3; Carriers of Goods, 12, 13, 14; Principal and Agent, 5; Limitation of Actions, 9; Telegraphs, 6.

1. *Railroads—Charter—Statutes—Lands.*—A railroad company is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in its charter or arising to it under the general laws. *Wallace v. Moore*, 114.

2. *Same.*—The Atlantic and North Carolina Railroad Company is not given any power to acquire and hold real estate for general purposes or otherwise except for the purpose of constructing and operating its railroad, restricted usually to a proper right of way and the necessary terminal facilities (ch. 136, Laws 1852); and this power is not enlarged under the general statutes. Rev., secs. 2566, 2567, subsecs. 2 and 3. *Ibid.*

3. *Railroads—Damages—Municipal Corporations—Cities and Towns—Bridges—Abutting Owners—Constitutional Law.*—Where a railroad company is required by a city to substitute a concrete bridge for one that has become rotten and unsafe, across its excavations, in connection with one of its streets, without specification as to its elevation, and accordingly the company has constructed the bridge and its approaches so as to damage the lands of an abutting owner, causing the level of the lot to be below that of the streets, etc., by raising the elevation of the bridge to make a higher clearance between it and the tracks for its own benefit, or convenience for the passing of its trains, the company is liable for the damages thus caused though it had acted under plans submitted to the municipal board and approved by it, under the principle that it may not take, under its charter, the lands of private persons or damage them, without just compensation. *Semble*, the company would also be liable if the city had specified the height of the bridge as built. *Powell v. R. R.*, 243.

4. *Railroads—Commerce—Statutes—Federal Employers' Liability Act—Employer and Employee—Master and Servant—Personal Injury.*—The purpose and design of the Federal Employers' Liability Act is to regulate suits for physical injuries or death of employees of railroad companies, while engaged as common carriers of interstate commerce, wrongfully caused by the negligence of the officers, agents, or employees of such carriers, or by reason of negligence in its cars, engines,

RAILROADS—*Continued.*

appliances, machinery, tracks, roadbed, works, bolts, wharves, or other equipment, and, when applicable, affords the controlling and exclusive rule of liability, requiring that both the carrier and the employee be engaged in interstate commerce, the latter being employed in the particular service as a part of interstate commerce, at the time of the injury, or in aid thereof, or so nearly related to it as to be practically a part of it. *Capps v. R. R.*, 558.

5. *Same—Courts—Jurisdiction—Motions—Evidence—Nonsuits—Trials.*—A carpenter, employed by a railroad company in repairing a chute within a State for the supply of coal to its interstate and intrastate trains, is not engaged in interstate commerce within the intent and meaning of he Federal Employers' Liability Act, and his suit under the act to recover damages for a personal injury thus occurring, alleged to have been caused by the railroad's negligence, brought in the State courts, will, on motion for judgment as of nonsuit, be dismissed. *Ibid.*

6. *Railroads—Lessor and Lessee: Torts of Lessee.*—A lessor railroad company is responsible for the torts committed by the lessee in the operation of the leased road, and in the exercise of its franchise, in the absence of legislation controlling the matter to the contrary. *Hill v. R. R.*, 607.

RATIFICATION. See Principal and Agent, 3.

REAL ESTATE. See Deeds and Conveyances.

REBUTTAL. See State's Land, 2; Evidence, 30.

RECEIVERS. See Wills, 11.

RECEIVING. See Criminal Law, 3; Indictment, 4.

RECORDERS' COURTS. See Courts, 1.

RECORDS. See Judgments, 13; Appeal and Error, 52, 59.

REFERENCE. See Judgments, 14.

REGISTRATION. See Pleadings, 1; Torrens Law, 3; Wills, 20, 21; Deeds and Conveyances, 23.

REHEARINGS. See Appeal and Error, 4.

RELAYS. See Telegraphs, 1, 2, 3.

REMAINDERS. See Wills, 13; Estates, 1, 3; Limitation of Actions, 6; Estoppel, 2.

REMARKS OF COURT. See Trials, 1.

REMOVAL OF CAUSES.

1. *Removal of Causes—Diversity of Citizenship—Motions—Issues of Fact—Jurisdiction.*—On motion of a nonresident defendant to remove a cause from the State to the Federal Court, under the Federal act, for

REMOVAL OF CAUSES—*Continued.*

diversity of citizenship, the plaintiff's cause of action, as a legal proposition, must be considered and dealt with as he has presented it in his complaint, and not otherwise. *Hill v. R. R.*, 607.

2. *Same—Federal Control—Director-General of Railroads—Statutes.*—Where a cause of action for a tort, brought by a citizen of this State, is alleged solely against a domestic corporation, and the Federal Director of Railroads, a nonresident, has been made a party defendant, as having control of the defendant railroad, he may not on that ground sustain a motion to remove the cause for diversity of citizenship, such expressly being prohibited by the Federal statute; nor may he do so upon the ground that he has also control of the nonresident lessee railroad corporation not a party to the action; especially is this so when the superintendent of the defendant railroad, as representative of the Director-General, has appeared and obtained a stay of the action on the ground that under and by virtue of his own order such suits, for the present, may be instituted only against him. *Ibid.*

3. *Removal of Causes—Petition—Controverted Facts—Legal Inferences—Courts—Jurisdiction.*—While the allegations in the petition to remove a cause from the State to the Federal Court are a part of the record and considered as true upon the hearing of the motion in the State courts, and all controverted facts are to be determined in the jurisdiction of the Federal Court, this does not apply when the real facts are not controverted, and there is a controversy raised only by an allegation in the petition based upon the petitioners' erroneous legal estimate of facts appearing in other portions of the record. *Ibid.*

4. *Removal of Causes—Diversity of Citizenship—Federal Control—Director-General of Railroads—Railroads—Lessor and Lessee—Foreign Railroads—Motions.*—Where the complaint of a resident plaintiff states a cause of action arising in tort against a domestic railroad company, the lessor of a foreign railroad corporation, operating the same under the charter, and the Director-General, a nonresident, appears and obtains a stay of the action, upon the ground that it could only be maintained against him in his official capacity, he may not thereafter successfully contend that the cause should be removed to the Federal Court for diversity of citizenship because he was also in official control of the lessee railroad, a nonresident corporation, not a party to the action. *Ibid.*

5. *Removal of Causes—Diversity of Citizenship—Pleadings—Allegations—New Parties—Motions—Parties.*—*Semble*, the Director-General of Railroads, who has procured a stay of an action brought by a resident of this State against a domestic lessor railroad corporation, for the tort of its lessee, a foreign corporation not a party, may not maintain his motion to remove the cause to the Federal Court for diversity of citizenship between the plaintiff and the nonresident lessee, the complaint alleging the cause of action solely against the resident corporation and the Director-General having been made a party at his own instance alone. *Ibid.*

6. *Removal of Cause—Transfer of Cause—Courts—Discretion—Appeal and Error.*—The order to remove a cause to another county for a fair and impartial trial is a matter within the discretion of the Superior Court

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REMOVAL OF CAUSES—*Continued.*
judge, and will not be reviewed on appeal unless plainly arbitrary and oppressive. *S. v. Wiseman*, 784.

REPRESENTATIONS. See Interstate Commerce, 1.

REQUESTS. See Instructions, 7.

RESCISSION AND CANCELLATION. See Equity, 2.

RESERVATIONS. See Deeds and Conveyances, 4.

RESIDENCE. See Wills, 19.

RESISTANCE. See Trespass, 2.

RESTAURANTS. See Statutes, 14.

REVERSIBLE ERROR. See Homicide, 13; Larceny, 2; Evidence, 33; Criminal Law, 15, 17.

REVERSION. See Actions, 2, 3; Pleadings, 8.

REVISAL.

SEC.

213. Attorneys entering special appearance to dismiss attachment should be required, on motion, to file written authority. *Walton v. Walton*, 74.

395 (10). Tenant in common may pay his share of taxes on land, and sheriff may sell for nonpayment, and purchaser acquire title after three years possession under tax deed. *Ruark v. Harper*, 249.

396. Right of action to taxpayer not affected by this section when he has complied with sec. 2855. *Ibid.*

408 (1). Married woman may sue alone for personal injury, as in trespass with excessive force. *Kirkpatrick v. Crutchfield*, 348.

415, 417, 419, 421. Actions against persons since deceased may be continued in the county in which it had been brought against personal representatives. *Latham v. Latham*, 12.

495. Pleadings liberally construed in pleader's favor. *Dixon v. Green*, 205.

507. A slight change from the proper name of a corporation in the process and pleadings will not warrant a motion to set aside judgment against it for excusable neglect, when it appears that it did not prejudice the defendant; and the judge, in proper instances, may allow amendment in his discretion. *Gordon v. Gas Co.*, 435.

513. Motion to set aside judgment by default for want of answer for mistake, surprise, etc., is in time if written a year from date of judgment. *Jernigan v. Jernigan*, 84.

535. Exceptions in this case that instructions were inadequate: *Held*, too general. *Sears v. R. R.*, 284.

535. Where two defendants are separately indicted and tried for violation of the prohibition law under circumstances connecting them with the same offense, an expression of the court in sentencing the first that he thought each guilty if the other was, is not a prohibited expression. This section strictly construed. *S. v. Baldwin*, 687.

REVISAL—*Continued.*

SEC.

556 (4). Judgment by default, in suit to declare deeds void and plaintiff the owner of title to lands, is properly entered when summons duly served and defendant fails to answer in statutory time. *Jernigan v. Jernigan*, 84.

573. This section does not apply as to time limit for motion to set aside judgment for want of answer, for mistake, etc. *Ibid.*

695. Homestead laid off before execution. Personal property exemption may be claimed up to final process. *Befarrah v. Spell*, 231.

964a (Greg. Suppl. Pell's Revisal). Provisions kept in restaurant to be prepared for food, and furniture and fixtures, not merchandise within meaning of this section. *Swift & Co. v. Tempelos*, 487.

1384. This section not required to right of action for repayment of taxes when sec. 2855 has been complied with. *R. R. v. Brunswick Co.*, 254.

1476. Superior Court has power to allow amendment to complaint on appeal from justice's court. *Pendergraph v. Express Co.*, 344.

1581. This does not apply to the rule that a devise will take effect at the earliest moment the construction of its language will admit of. *McDonald v. Howe*, 257.

1590. Sale of land by commissioner under Torrens Law cuts off rights of persons in being, or hereafter to come into being. *Hayden v. Hayden*, 259.

1590. The purchaser of lands sold under this section is not ordinarily charged with duty to see that the reinvestment is made accordingly. *McLean v. Caldwell*, 424.

1630, 1634, 1635. A man and his wife charged with highway robbery, the *feme* defendant being present and taking watch from prosecutor's pocket: *Held*, male defendant could not compel *feme* defendant to testify against her will that watch was found in bed occupied by his wife and another man to show he was not present when watch was stolen. *S. v. Medley*, 710.

1679. Does not authorize impounding of stock in possession and control of owner. *Kirkpatrick v. Crutchfield*, 348.

1692. Railroad companies without general power to acquire lands may not make a valid entry of State's lands, either directly or through a trustee. *Wallace v. Moore*, 114.

1693, 1696. Navigable waters only subject to entry for wharfage purposes by riparian owners. *Barfoot v. Willis*, 200.

1758. Deed reserving life estate to grantors and to H. with *habendum* and warranty to "issue" of H., and her bodily heirs, an estate tail converted to a fee simple by the statute. *Parrish v. Hodge*, 133.

1788, 1789, 1798, 1800. A payment for the extension of a timber contract after the death of the grantor requires not only tender to the guardian of the minor heirs, but also supervision of the court. *Morton v. Lumber Co.*, 163.

REVISAL—*Continued.*

SEC.

1898. This section is not in conflict, but gives the wife the option of the two remedies of proceeding before the clerk, or dispensing with the written consent of husband, an idiot or lunatic. *Lancaster v. Lancaster*, 22.

1951. Only usurious rate of interest is forfeited when charged but not paid. *Ragan v. Stevens*, 101.

2021. Where the owner has accepted his building as according to contract, and paid the contractor in full, he cannot hold surety on contractor's bond liable for claim of materialman, of which he received statutory notice before payment. *Mfg. Co. v. Holladay*, 417.

2107. Husband's possession of wife's land under her void deed for noncompliance with this section, not adverse so as to ripen his title. *Kornegay v. Price*, 441.

2116. This section dispensing with husband's written consent to wife's conveyance of land when he is an idiot or lunatic is not unconstitutional or in conflict with Rev., 1898, providing for petition before the clerk, the remedy selected being optional by the wife. *Lancaster v. Lancaster*, 22.

2566, 2567 (2), (3). The power of a railroad company not having the power to acquire lands for general purposes, is not enlarged under this section. *Wallace v. Moore*, 114.

2632. Penalty on railroads for delay in transportation of freight, valid as a police regulation. *Owens v. Hines*, 325.

2695. An act authorizing bonds for bridge between adjoining counties, apportioning the cost between them, is constitutional. *Martin County v. Trust Co.*, 26.

2832, 5455, 5456. Later laws declaring themselves amendatory of former laws increasing the punishment for a second offense do not repeal the prior statute. *S. v. Mull*, 748.

2855. Payment of taxes under protest and within 30 days gives claimant present right of action after 90 days. *R. R. v. Brunswick Co.*, 254.

2909. This section must be complied with by owner of lands sold for taxes. *Ruark v. Harper*, 249.

2916 (6), 2978. These sections are reconcilable, and under the former it is not necessary to sell a public utilities at public outcry, but may be privately sold, when the question has been submitted to the voters and approved. *Allen v. Reidsville*, 513.

3135. Purchasers from heirs of deceased may caveat a will brought forward after many years. *In re Thompson*, 540.

3139. Prior to ch. 219, Laws 1915, no limit of time was fixed to probate a will against rights of purchasers from heirs at law, the later act now fixing the limit as two years from the death of the testator, and is prospective in effect. *Bernhard v. Morrison*, 563.

3244. A bill of particulars should be asked if indictment is sufficient and further particulars are desired. *S. v. Caylor*, 807.

REVISAL—*Continued.*

SEC.

3254. Indictment charging larceny of lumber from a certain owner at a certain place is sufficient. *S. v. Caylor*, 807.

3269. A conviction may be had of less degree of crime charged under an indictment. Rev., secs. 3233, 3698. *S. v. Rumple*, 717.

3233, 3698. Where there are three counts in the indictment and two of them are bad, conviction may be had under the third. *Ibid.*

3287. An accessory before the fact in procuring another to commit the criminal offense may be tried before the principal felon. *S. v. Reid*, 745.

3298. Declarations of members of lynching mob may be competent against others therein. *S. v. Rumple*, 717.

3360. Husband's testimony as to the virtuousness and innocence of his wife before elopement of wife, is sufficient as to her virtue to sustain a conviction against the man eloping with her. *S. v. O'Higgins*, 708.

3361. Where offense is committed here this section does not attempt to convey extra territorial jurisdiction on our courts. *S. v. Moon*, 715.

3408. Where the indictment charges the sheriff with unlawfully, "willfully, and feloniously" failing to pay over money collected by him by virtue of his office, a verdict of guilty will be construed as of the offense charged, and the words "willfully and feloniously" may not be regarded as surplusage, and a charge that he would be guilty if he failed to pay over the money (Rev., 3576) is reversible error. *S. v. Windley*, 670.

3621. Evidence in this case *held* sufficient of a secret assault. *S. v. Bridges*, 733.

3634. The consent of an imbecile girl over eighteen may not be a defense to a charge of assault upon a woman. *S. v. Marks*, 730.

3698, 3233. These two sections making lynching a felony and giving jurisdiction to court of adjoining county are constitutional. *S. v. Rumple*, 717.

3702. State must show an ordinance valid to convict of offense thereunder, and party indicted for not paying for license is not required to have paid under protest before defending under an indictment for the offense, when ordinance is invalid. *S. v. Prevo*, 740.

4161. A compliance with this section necessary to a valid appointment of a teacher. *Spruill v. Davenport*, 364.

RIGHTS OF WAY. See Limitation of Actions, 9; Telegraphs, 6.

RIPARIAN OWNER. See Entry, 1.

ROADS AND HIGHWAYS. See Counties, 2; Constitutional Law, 12, 14, 15, 16, 17, 20, 23, 25; Statutes, 7.

RULES. See Carriers of Goods, 14.

RULES OF COURT. See Appeal and Error, 5, 19, 37, 49.

SAFE PLACE TO WORK. See Employer and Employee, 6, 9, 11.

SALARIES. See Statutes, 11, 12.

SALES. See Constitutional Law, 6, 17, 19; Judgments, 12; Appeal and Error, 6; Mortgages, 2, 4, 5, 6, 7, 8, 9, 10, 15, 16, 18, 20; Wills, 12, 15; Commerce, 1; Trusts, 7; Municipal Corporations, 9; Statutes, 17; Elections, 1, 2; Deeds and Conveyances, 21.

SALES IN BULK. See Vendor and Purchaser, 1; Parties, 3; Statutes, 13.

SAMPLES. See Vendor and Purchaser, 1.

SCHOOLS. See Statutes, 5.

1. *Schools—Taxation—Statutes—Constitutional Law.*—Chapter 102, Public Laws of 1919, in relation to an additional levy by the county commissioners to raise a deficiency in the amount of the budget furnished by the county board of education for the maintenance and support of schools is to be interpreted with the constitutional amendment requiring a six-months term. *Board of Education v. Comrs.*, 305.

2. *Same—Special Tax.*—If the levy under chapter 102, Public Laws of 1919, of 35 cents on the one hundred dollars is insufficient for "the support and maintenance" of a six-months term of school in the county, the county may receive from the "State Public School Fund" such amount as necessary for the purpose; and the provision of section 6, "that no county shall be compelled to exceed the limit of 35 cents on the hundred dollars, except as provided in section 7," refers, in the exception, to an increase of the levy permitted by the later section, which is "not to exceed 25 per cent of the teachers' salary fund" (provided for in section 6), if the amount should then be insufficient, under section 7, after exhausting all sources from which it comes, for the purpose of defraying the expenses necessary for schools, accessories, etc., as provided by section 7. *Ibid.*

3. *Same — Mandamus — County Commissioners — Discretion.*— Under the provisions of sec. 8, ch. 102, Laws of 1919, where the board of county education and the board of county commissioners disagree as to the amount needed for the maintenance of a six-months term of the public schools or as to the rate of taxation, or if the county commissioners refuse to levy the necessary tax, a mandamus will lie by the board of county education against the board of county commissioners, based upon the disagreement, by the express requirement of the statute. *Ibid.*

4. *Schools— Contracts— Employment— Committee—Individual Liability—Damages—Fraud—Issues.*—The members of a committee of a public school district in the employment of teachers therefor, etc., are public officers when acting in discharge of their duties, and are not personally liable in damages for their acts unless such are done by them corruptly or with malice; and an issue submitted as to their personal liability, which is only directed to whether their removal of a teacher is wrongful, is insufficient to warrant a judgment, and reversible error on defendant's appeal. *Spruill v. Davenport*, 364.

SCHOOLS—*Continued.*

5. *Same—Teachers—Contracts—Legal Appointment.*—It is the duty of the committee of a school district, under the statute, to dismiss a teacher of the public schools therein who has not been legally appointed, according to the statute, and no damages are recoverable against the individual members when in the exercise of this rightful power they act accordingly, whether their motives were bad or otherwise. *Ibid.*

SEAL. See Taxation, 6.

SENTENCES. See Courts, 5.

SERVICE. See Husband and Wife, 2.

SETTLEMENT. See Contracts, 16; Equity, 2, 3.

SEVERANCE. See Indictments, 2.

SHELLEY'S CASE. See Estates, Tail, 1; Wills, 7, 14; Estates, 3.

SHERIFFS. See Taxation, 2.

Sheriffs—Indictment—Statutes—Taxes—Instructions—Appeal and Error. Where the defendant, a sheriff, is convicted under an indictment under Rev., 3408, for unlawfully, "willfully, and feloniously" failing to pay over moneys collected by him by virtue of his office, and by a second count, that he, in like manner, willfully and feloniously failed to pay them to the county treasurer and other parties lawfully entitled thereto, a verdict of the jury of guilty is construed as being guilty of the offense charged in the indictment, and the words "willfully and feloniously" may not be regarded as mere surplusage because of a charge by the court, in effect, that he would be guilty under the first count, under Rev., 3576, upon his own evidence, if believed, to the effect that he had failed to pay over to the proper persons all money he had received for them by virtue or color of his office, the offense under the former section being a felony, and under the latter a misdemeanor, and the instruction is held as reversible error. *S. v. Windley,* 670.

SHIPMENT. See Contracts, 10.

SINCE LAST CONTINUANCE. See Pleadings, 11.

SINKING FUND. See Constitutional Law, 4.

SLANDER. See Libel and Slander, 1, 2, 3, 4.

Slander—Ambiguous Language—Questions for Court—Questions for Jury—Trials—Demurrer.—When the words alleged to have been slanderously spoken are unambiguous in their meaning, it is for the court to decide whether they admit of a slanderous interpretation; and for the jury to decide whether they were slanderous to the reasonable apprehension of the hearers, when such words are ambigous; and it is held, under the circumstances of this case, the words alleged to have been slanderously spoken by the defendant, that plaintiff's wife told defendant that the plaintiff had shut up defendant's chickens and instead of turning them out, at her request, had taken them off and sold them, are sufficient to be submitted to the jury to determine

SLANDER—*Continued.*

whether, within the reasonable apprehension of the hearers, they charged the plaintiff with the larceny of the defendant's chickens, and a demurrer is bad. *Vincent v. Pace*, 421.

SPECIAL REQUESTS. See Vendor and Purchaser, 7; Appeal and Error, 16.

SPECIAL STATUTES. See Statutes, 11.

SPECIAL TAX. See Schools, 2.

SPECIFIC PERFORMANCE. See Options, 1; Torrens Law, 1; Contracts, 18, 21.

SPIRITUOUS LIQUOR. See Intoxicating Liquors; Statutes, 19.

1. *Spirituous Liquor— Evidence— Circumstance— Instructions.*— The defendant, tried for violating the prohibition laws of the State, was seen carrying the liquor to the premises of his brother, and ran away before he could be taken. As the officers were loading an automobile with the liquor, he suddenly appeared and ran away with the key of the machine to prevent them from carrying it away: *Held*, with the other evidence in this case tending to show his guilt, it was not error for the trial judge to state, in giving the contentions of the parties, that the State relied upon this as a circumstance tending to show guilt, and the same would have been proper as an instruction. *S. v. Baldwin*, 688.

2. *Spirituous Liquor—Possession—Evidence—Appeal and Error—Harmless Error.*—Where the evidence of defendant's possession of spirituous liquors is sufficient to make out a *prima facie* case that it was for the purpose of sale, testimony of those who were found on the premises at the time of the search, in reply to the officer's questions, as to why and for what purposes they were there, that they knew nothing of the liquor, and were only stopping en route to another place to have their automobile repaired, as it appeared to be harmless, if erroneous, and of it the defendant cannot complain, certainly if he afterwards derived a benefit therefrom. *S. v. Baldwin*, 693.

3. *Spirituous Liquors—Possession—Evidence—Nonsuit.*—Testimony of the officers making the search of the premises of defendant, who was indicted for having in his possession spirituous liquor for the purpose of sale in violation of the statute, that certain sufficient quantities thereof were found in different places thereon, in jugs and kegs, etc.; that corks, bottle-wrappers, and a suitable glass for retailing it were found, together with a keg having a lock faucet, the key of which was in defendant's possession; and of the conduct of the defendant, etc., is *Held*, in this case, competent to show the unlawful intent of the defendant to sell, and his unlawful purpose in having the liquor on his premises, and the defendant's motion as of nonsuit was properly denied. *Ibid.*

4. *Spirituous Liquor—Possession—Evidence—Principal and Agent.*—With the other evidence in this case as to the defendant having sufficient spirituous liquor in his possession and on his premises to make a *Prima facie* case under statute of the unlawful purpose of sale, testimony of the acts of his brother in carrying such liquor from an auto-

SPIRITUOUS LIQUOR—*Continued.*

mobile to defendant's premises, under the surrounding circumstances, is held to be competent as to his agency for the defendant in so doing. *Ibid.*

STATE. See Limitation of Actions, 2.

STATE LANDS.

1. *State Lands—Railroads—Persons—Enterer—Trustee—Trusts.*—A railroad company having no power to acquire lands except that which is limited to railroad purposes, does not come within the intent and meaning of Rev., sec. 1692, permitting all persons who shall come within the State, etc., to enter and obtain grants for the State's vacant and unappropriated lands, either directly or through a trustee who has made the entry and obtained the grant solely for its use or enjoyment. *Wallace v. Moore*, 114.

2. *State's Lands—Board of Education—Title—Presumptions—Rebuttal.*—The presumptions in favor of the title to State's swamp lands in favor of the board of education as successors to the "Literary Fund," are expressly excluded by the statute (Rev. Stat., ch. 67, sec. 3) when such lands have been theretofore entered and granted to individuals by the State, the presumption lasting only "until the other party shall show that he hath a good and valid title," and one claiming under a grant issued before the enactment of the statute, and connecting his title by *mesne* conveyances therewith, is entitled to recover against the one claiming under said board, unless his adversary can otherwise show a good title thereto. *Shingle Co. v. Lumber Co.*, 221.

STATEMENT. See Trials, 2.

STATE'S RIGHTS. See Constitutional Law, 11.

STATUTE OF FRAUDS. See Contracts, 1, 18, 19, 20; Trusts, 5.

STATUTES. See Constitutional Law, 1, 2, 3, 4, 5, 6, 7, 10, 12, 15, 16, 17, 20, 22; Husband and Wife, 1, 7, 8; Counties, 2, 3, 4, 5; Removal of Causes, 2; Executors and Administrators, 1, 2; Torrens Law, 1, 3, 4, 5; Venue, 1; Attorney and Client, 1; Townships, 1; Taxation, 1, 2, 4, 7, 8, 10; Railroads, 1, 4; Carriers of Goods, 4, 15, 16; Drainage Districts, 1, 2; Estates, Tail, 1; Judgments, 1, 2, 4, 11; Mortgages, 10; Evidence, 13; Usury, 1; Limitation of Actions, 7; Banks and Banking, 3; Vendor and Purchaser, 5; Appeal and Error, 15, 29, 38; Entry, 1; Indictment, 1; Instructions, 8; Schools, 1; Pleadings, 7, 11; Divorce, 1; Materialmen, 1, 3; Wills, 15, 20, 21, 22; Descent and Distributions, 3; Partnerships, 1; Libel and Slander, 3; Intoxicating Liquor, 1, 4; Bigamy, 1, 2; Jurors, 1; Sheriffs, 1; Homicide, 14; Larceny, 1; Municipal Corporations, 10, 11; Criminal Law, 5, 6, 7, 8, 10, 12, 14, 15.

1. *Statutes—Deceased Persons—Evidence—Witnesses—Interest in Result.* A witness who has never claimed and who has no interest in the title to lands, the subject of a suit to establish a resulting trust therein, under a deed to the defendant's deceased ancestor, has no interest in the result of the suit, and is not disqualified under our statute to testify as to transactions or communications with a deceased person. *Harris v. Harris*, 7.

STATUTES—*Continued.*

2. *Statutes—Interpretation—Changes of Phrases.*—The sections of the Revisal upon the same subject-matter must be construed in connection with each other, as a whole and not in part, in order to ascertain the legislative will, when apparent inconsistencies are to be reconciled; and a change of phraseology may raise a presumption of a change of meaning. *Latham v. Latham,* 12.

3. *Same—Venue—Executors and Administrators—"Instituted" Actions.*—Revisal, sec. 421, as to the venue of an action upon official bonds and against executors and administrators, requiring that such actions shall be "instituted," that is, commenced, in the county therein specified, has no application where an action has been commenced in another county against a defendant, who has since died, and his administrator has been made a party, the word "instituted" used in this section being different from that used in the other sections of the Revisal that specify where the actions are to be "tried." Revisal, secs. 419, 420. *Ibid.*

4. *Statutes—Amendments—Interpretation.*—Chapter 297, Public Laws 1917, amending ch. 122, Public Laws 1913, should be construed together to ascertain their true intent and meaning: and *semble,* no authority is given a township to work its roads by current taxation. *Road Commission v. Comrs.,* 61.

5. *Statutes—Interpretation—Mandatory—Schools—Teachers—Employment—Dismissal—Damages.*—The provisions of Pell's Revisal, sec. 4161, that the county board of education fix annually a day and place for the meeting for the township or district committeemen to be in conference with the county superintendent to select a teacher from applications previously filed, and that the election of a teacher will not be valid without the approval of the county superintendent, who shall not sign a voucher for the salary of a teacher unless he has received satisfactory evidence of the election of such applicant, or a copy of the contract required to be filed with him, as required, are mandatory and necessary to have been complied with in order to make the appointment a lawful one. *Spruill v. Davenport,* 364.

6. *Statutes—Interpretation—Intent—Mandatory—Directory.*—While there is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory, the intent and meaning of the Legislature will control, as ascertained from the phraseology of the statute, considering its nature, design, and the consequences that would follow a noncompliance with it. *Ibid.*

7. *Statutes—Repeal—Reënactment—Counties—Bonds—Roads and Highways.*—The act of 1919, relating to Wilkes County, reënacting and continuing in force the provisions of the act of 1915, restoring the authority to issue the amount of bonds for county road purposes, after it had been reduced by the act of 1917, was intended to enforce the will of the Legislature expressed in the act of 1915, by supplying the means and facilities, in the way of necessary funds, for doing so. *Comrs. v. Pruden,* 394.

8. *Statutes—Amendments—Interpretation.*—Acts amendatory to former acts of the Legislature are construed therewith as one and the same statute. *Hamlin v. Carlson,* 431.

STATUTES—*Continued.*

9. *Same—Chiropractics—Board of Examiners—Discretion—Courts—Mandamus.*—Chapter 73, Public Laws, 1917, establishing a board of chiropractic examiners, gives this board large discretionary powers to examine and license applicants to practice this science, and to pass upon their other qualifications specified therein; and, construed with its amendatory act of 1919, ch. 148, under sec. 2, it is provided that those practicing chiropractics in this State prior to 1918 may receive their license upon proof of good character and proper proficiency upon examination; it is also provided that those so practicing prior to 1917 shall be granted a license without examination: *Held*, neither the proviso of the Laws of 1918 or 1917 dispenses with the discretionary power of the board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been *bona fide* practitioners for the requisite time, into which the courts will not inquire, and a mandamus will not lie. *Ibid.*

10. *Statutes—Cities and Towns—Municipal Corporations—Commission Government—Salaries—Public Officials—Public Policy.*—In construing the general municipal act, Laws 1917, subch. 5, subsequently passed to the late amendments of our Constitution, and sec. 6 thereof, as follows: "The governing body of any city may, by ordinance, fix the salary of the mayor of such city, or heads of departments or other officers," and to discover its true meaning, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question. *Kendall v. Stafford*, 461.

11. *Same—Fix Salaries—Increase Salaries—Special Statutes—General Statutes—Constitution.*—Where by special legislation a commission form of government is provided for a city, creating three commissioners and dividing the authority between each of them and giving them united authority as a board, and the act itself has fixed the salary of each of them, who have accepted the duties before the late constitutional amendment, the provisions of the general municipal act, subch. 5, sec. 6, allowing the governing body of the city to "fix" the salary of the commissioners, does not permit them to change the general policy of the law, that public officers themselves may not pass upon matters in their official capacity in which they have a personal interest, and the board, created under the special act are without authority to increase the salaries of its members claiming such authority under the general law. *Ibid.*

12. *Statutes—Cities and Towns—Municipal Corporations—Commission Government—Public Officers—Salaries—Increase—Vote of People.*—The general law permitting incorporated cities and towns to adopt a commission form of government, Laws 1917, subch. 5, by giving, under sec. 6, authority to the governing board by ordinance to "fix" the salary "of the mayor, . . . or heads of departments, or other officers," does not, by correct interpretation, permit the board, consisting of the mayor and two other commissioners, to increase their own salaries, fixed by the act, contrary to the settled policy of the State forbidding public officials to pass, as such, upon matters in which they are personally pecuniarily concerned, there being no express provision in the statute to that effect, the question for such increase being one for the people to vote upon. *Ibid.*

STATUTES—*Continued.*

13. *Statutes—Common-law Right—Sales in Bulk.*—The statute making void as against creditors a sale of a large part or the whole of a stock of merchandise in bulk, unless the requirements of the act are complied with, is in derogation of the common law, and must be strictly construed. Gregory's Suppl. Pell's Revisal, sec. 964a. *Swift & Co. v. Tempelos*, 487.

14. *Same—"Merchandise"—Restaurants—Provisions—Furniture—Fixtures.* Within the intent and meaning of our statute relating to the sale of merchandise in bulk, the word "merchandise" is limited to things ordinarily bought and sold in the way of merchandise, the subject of commerce and traffic, and does not include a stock of provisions or supplies kept in a restaurant to be prepared and served to its customers for meals, or to the furniture and fixtures used therein in connection with conducting the business of a restaurant. *Ibid.*

15. *Statutes—Penal—Interpretation—Intent—Common-law Right.*—Chapter 77, Laws 1913, to regulate the use of assumed names in partnerships, imposes a fine or imprisonment upon the failure of the parties to comply with its provisions in not filing the name of the concern, and of the partners therein, etc., is a derogation of a common-law right, and will not be extended by construction, but strictly construed as to the legislative intent. *Price v. Edwards*, 493.

16. *Statutes—Interpretation—Legislative Purpose—Intent.*—Statutes relating to the same subject-matter should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the Legislature may be considered in the effort to ascertain the uniform and consistent purpose of the Legislature. *Allen v. Reidsville*, 514.

17. *Same—Municipal Corporations—Cities and Towns—Public Utilities—Public Outcry—Private Sales—Vote of People—Elections.*—Before the enactment of our statute, now Rev., 2916 (6), our courts had interpreted our statute, now Rev., 2978, requiring a sale at public outcry by municipal authorities, as not including public utilities such as parks, markets, city halls, waterworks, lighting plants, etc., held for the use of the public, and said sec. 2916 (6) was thereafter enacted, requiring that such public utilities, excluded by sec. 2978, should be submitted to the voters of the municipality, and it is *Held*, that these two statutes are harmonious and reconcilable, and that under the provisions of sec. 2916 (6) it is not required that a sale of public utilities, held in trust for the citizens, and approved by the voters, be made at public outcry to the highest bidder, but may be sold privately, which, in this case, is particularly emphasized by the charter of the city in question. *Ibid.*

18. *Statutes—Amendments—Effect.*—The effect of an amendment to a statute is to incorporate the old statute into the amendment with the same effect as if the amendment had been a part of the old statute when the latter was enacted. *S. v. Moon*, 715.

19. *Statutes — Amendatory — Prospective Effect — Intoxicating Liquors — Criminal Law—Punishments.*—A public-local law making the selling of intoxicating liquors in a certain county a misdemeanor is not repealed by a later statute, making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court,"

STATUTES—*Continued.*

and a felony for the second offense; the later statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense has been committed prior to the enactment of the latter act, it is punishable under the prior law. Rev., 2832, 5455, 5456. *S. v. Mull*, 748.

STOCK LAW. See Constitutional Law, 10.

STREETS. See Municipal Corporations, 2, 3.

SUICIDE. See Insurance, Life, 1.

SURFACE WATERS. See Municipal Corporations, 5, 7.

TAXATION. See Constitutional Law, 3, 4, 7, 8, 12, 13, 14, 15, 16, 17, 22, 23, 25; Counties, 3, 4, 5; Schools, 1; Automobiles, 1; Municipal Corporations, 10.

1. *Taxation—Statutes—Bonds—Municipalities.*—Under the provisions of ch. 122, Public Laws of 1913, townships may establish and maintain a township road system under its separate governance, but the method is restricted to an issuance of bonds for road purposes upon the approval of its voters, and to taxation limited to the payment of the interest on the bonds, without provision for the working or maintenance of the roads directly by current taxation. *Road Commission v. Comrs.*, 61.

2. *Taxation—Deeds and Conveyances—Statutes—Sheriffs—Settlement—Evidence—Declarations.*—One claiming title to lands under a tax deed given by the sheriff to the Governor in settlement for his taxes under Rev. Stat., ch. 102, sec. 60 *et seq.*, must make it sufficiently appear that the statute, strictly construed, was complied with, and the deed will be declared inoperative to pass the title when it does not appear that it was acknowledged in open court or that it has been registered in the clerk's office, as required by the statute, or that the sheriff had produced and filed the deed in the Secretary of State's office, etc.; and a recital in the attestation clause of the sheriff's deed that the deed was acknowledged in open court, and not made by an officer authorized to take acknowledgments, is alone insufficient as to such fact, and is only the unsworn declaration of the sheriff. *Shingle Co. v. Lumber Co.*, 221.

3. *Taxation—Tax Deeds—"Color"—Adverse Possession—Limitation of Actions.*—A sheriff's deed for the nonpayment of the taxes on lands is "color" which will ripen the title in the purchaser by sufficient adverse possession for seven years. *Ruark v. Harper*, 249.

4. *Same—Tenants in Common—Statutes.*—The statute permits the sheriff to sell the lands of tenants in common for the nonpayment of taxes, and a tenant in common to pay his or her part of the tax and let the other shares go; and provides that three years possession by the purchaser under the tax deed bars the former rightful owners. Rev., sec. 395 (10). *Ibid.*

TAXATION—*Continued.*

5. *Same—Husband and Wife—Deeds and Conveyances.*—Where the husband is a purchaser of lands held by his wife and others as tenants in common, under a sheriff's deed for the nonpayment of taxes, his adverse possession thereof for seven years will ripen the title under his deed against all except his wife, and their joint conveyance to a purchaser will convey the full title. *Ibid.*

6. *Taxation—Evidence—Tax Deeds—Deeds and Conveyances—"Seal"—Presumptions—"Color"—Adverse Possession—Limitation of Actions.*—Where a certified copy of a sheriff's deed given for the nonpayment of taxes recites that the deed was under seal, the law presumes that the original deed was under seal; and were it otherwise, and the tax title does not comply with the statute, Rev., 395 (10), it is good as color of title, which seven years adverse possession will ripen into an absolute one. *Ibid.*

7. *Taxation—Tax Deeds—Conditions Precedent—Actions—Statutes—Presumptions—Deeds and Conveyances.*—The plaintiff in an action to set aside a tax deed to lands must comply with the requirements of Rev., 2909, as to showing his own title at the time of the sale, the payment of all taxes due, and introduce evidence to rebut the statutory presumptions in favor of the regularity of the deed under which the purchaser claims. *Ibid.*

8. *Taxation—Payment—Protest—Statutes—Actions.*—Where, in conformity with the provisions of Rev., sec. 2855, a person has paid an assessment or tax for State and county purposes against his property, and at the time thereof has notified the sheriff in writing that he paid it under protest, and within the thirty days he has demanded the same in writing from the officer therein designated, and the same is not repaid within the ninety days required by the statute, the party so acting has a present right of action for the recovery of the tax without the necessity of having made the presentation and demands to the proper municipal authorities referred to in Rev., sec. 1384, as to auditing and examination of claims, etc., or to the chairman of the board of county commissioners, referred to in Rev., sec. 396, the later act, Rev., 2855, being regarded as an exception to the general requirements of the preceding ones—secs. 1384, 396. *R. R. v. Brunswick*, 254.

9. *Taxation—Constitutional Law—License—Automobiles—Foreign Dealers—Investments in North Carolina—Deductions—Equality.*—Sec. 72. ch. 231, Laws 1917, imposing license taxes on the manufacturer or other person engaged in the business of selling automobiles in this State, reducing the rate if three-fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every State, and being for the object of reducing the license tax for selling automobiles in this State when the seller is already paying a tax here on three-fourths of his assets, is violative neither of the Federal Constitution, Art. I, sec. 8 (3), Art. IV, sec. 2, Art. XIV, sec. 1, or of our State Constitution, Art. V, sec. 3. *Motor Co. v. Flynt*, 399.

10. *Taxation — Limitations — Ordinary Expenses — Constitutional Law — Counties and Towns—Municipal Corporations—Statutes—Protest—*

TAXATION—*Continued.*

Actions.—An act which attempts to authorize a county to levy a tax in excess of the 66⅔ cents on the hundred-dollar valuation of property, State Constitution, Art. V, sec. 1, for "current and necessary expenses," is for the ordinary expenses of the county and is void as to the excess; and not being valid under section 6 of the same article relating to taxation for special purposes, a taxpayer, having paid the tax under protest and conformed to the provisions of the statutes, may recover it in his action. *R. R. v. Cherokee County*, 177 N. C., 86, cited and applied. *R. R. v. Comrs.*, 449.

11. *Taxation—License—Municipal Corporations—Cities and Towns—Classified as to Population—Census—Statutes.*—Where a statute classifies the cities, towns, or other subdivisions of the State by population, such classification, unless otherwise specified, is to be determined by some "official enumeration officially promulgated," and in the absence of a State statute appertaining to the subject, or some authoritative municipal regulation, the Federal census is usually adopted and allowed as controlling. *S. v. Prevo*, 740.

12. *Same.*—Our statute, Revisal, Acts of 1917, ch. 231, sec. 28a, regulating the amount of license tax to be charged for moving picture and vaudeville exhibitions in accordance with a stated classified population of towns, refers to the Federal census in use at the time, and a city ordinance of one of these towns, which, by an unofficial or without a legally authorized enumeration of its inhabitants, places a higher license tax on these shows than is authorized under the Federal census report, is void, the amount to be collected being such as is shown by the Federal census, when no official or legally authorized method is otherwise provided. *Ibid.*

13. *Same—Protest—Void Ordinances—Criminal Law.*—Where a city or town ordinance imposes a license tax on a moving picture exhibit or other lawful enterprise in excess of that permitted by statute, and refuses to license such enterprise upon tender of the lawful tax, it is not necessary that the enterprise should have paid, under protest, the tax demanded for it to successfully defend itself under indictment for failure to have obtained the license. Rev., 3702. *Ibid.*

TAX DEEDS. See Taxation, 3, 6, 7; Limitation of Actions, 4.

TAXES. See Constitutional Law, 2, 23; Sheriffs, 1.

TEACHERS. See Statutes, 5; Schools, 5.

TELEGRAMS. See Evidence, 23.

TELEGRAPHS. See Constitutional Law, 11; Limitation of Actions, 9.

1. *Telegraphs—Commerce—Interstate—Relays—Burden of Proof—Verdict Set Aside.*—Where a telegraph company has direct available facilities for transmitting an intrastate telegram altogether within the State, and relays it at offices in another State, the burden of proof is upon it to show that it was not done to evade the jurisdiction of the State court, and it is reversible error for the trial judge to set aside the answer to the issue in the plaintiff's favor as a matter of law. *Speight v. Tel. Co.*, 146.

TELEGRAPHS—*Continued.*

2. *Telegraphs—Intrastate Commerce—Interstate—Relays.*—A telegraph company accepting a telegram to be transmitted between points in this State, where a recovery for mental anguish is allowed, may not avoid such liability under the Federal decisions by unnecessarily sending the message through another State, when it could have reasonably been otherwise transmitted. *Ibid.*

3. *Telegraphs—Commerce—Interstate—Relays—Beyond the State—Bad Faith—Mental Auguish—State Decisions.*—Where a telegraph company has one or several means of sending entirely within the State, a message received at one point therein to another within its boundaries, the relaying of the message beyond the borders affords evidence that it was done in bad faith to change the intrastate character of the message, and disregard our own decisions as to the recovery of mental anguish alone, and a verdict of the jury that its transmission thus was in bad faith, and awarding damages, will be sustained. *Watson v. Tel. Co.*, 471.

4. *Telegraphs—Service Messages—Delay in Delivery—Negligence—Evidence—Sickness—Death—Mental Anguish.*—A telegraph company failed to promptly transmit and deliver a message announcing the extreme illness of the plaintiff's brother residing about two miles from its terminal office, thirty-five miles from its initial office; and the evidence tends to show that the plaintiff, the sender of the message, had several conversations with the defendant's agent on the morning after the defendant had received it, and had been once, about noon, in the defendant's terminal office; that the message had been received for transmission about 9:30 one day and delivered about 5 p. m. the next, without evidence that defendant had sent back a service message or had searched for the plaintiff at its terminal office, and that as soon as he received the message the plaintiff immediately went to the place where his brother was, but arrived after the funeral: *Held*, sufficient to sustain a verdict of the jury upon the questions of whether, except for the defendant's negligence, the plaintiff would sooner have gone to his brother and have arrived before his death or burial. *Butler v. Tel. Co.*, 544.

5. *Telegraphs—Sickness—Death—Evidence—Presumptions—Near Relation—Damages—Contributory Negligence.*—The presumption is that a person who receives a telegram announcing the extreme illness of his brother will make every reasonable effort to promptly go to him. *Ibid.*

6. *Telegraphs—Easements—Railroads—Rights of Way—Superimposed Burdens—Damages.*—The constructing and maintaining a line of telegraph poles and wires upon the right of way of a railroad company imposes an additional or new burden upon the owner of the fee, who is entitled to a reasonable and just compensation therefor. *Query v. Tel. Co.*, 639.

7. *Same—Evidence.*—As between the owner of the fee and a telegraph company, which by constructing and maintaining a telegraph line upon the right of way of a railroad company, has imposed a new or additional burden thereon, an instruction is correct, that the jury may consider, in awarding damages, that the fee was already subject to the burden of the railroad right of way; and it is *Held*, in this case,

TELEGRAPHS—*Continued.*

that the question of the diminution of the value of the defendant's easement by the right of the railroad company to the full use of its easement was not a matter for the jury's consideration, especially as the contractual relations between these two corporations does not appear. *Ibid.*

TENANT BY THE CURTESY. See Actions, 2.

TENANTS IN COMMON. See Taxation, 4.

1. *Tenants in Common—Husband and Wife.*—The relationship of husband does not make the man a tenant in common of lands by reason of the fact that his wife is such tenant. *Ruark v. Harper*, 249.

2. *Same—Deeds and Conveyances.*—The husband may not acquire under a tax deed the interest of his wife as a tenant in common with others in lands, though he may acquire thereby the title of the others; and a deed made by the husband and wife of the lands he has thus acquired will convey the whole title to the purchaser. *Smith v. Smith*, 150 N. C., 81, cited and distinguished. *Ibid.*

TENDER. See waiver, 1, 2; Mortgages, 14, 15.

TERM. See Jurors, 1.

TESTACY. See Wills, 10.

TIMBER. See Contracts, 1, 5; Interpleader, 1; Deeds and Conveyances, 8, 12; Injunction, 3.

TIMBER DEEDS. See Deeds and Conveyances, 4, 5, 6; Parties, 1.

TITLE. See State's Lands, 2; Interpleader, 1; Mortgages, 11; Vendor and Purchaser, 3; Carriers of Goods, 1, 12; Deeds and Conveyances, 6, 21; Descent and Distribution, 2; Wills, 2, 3; Instructions, 2; Boundaries, 2; Estates, 1; Pleadings, 8.

TOOLS AND APPLIANCES. See Employer and Employee, 3.

TORRENS LAW.

1. *Torrens Law—Statutes—Contracts—Specific Performance—Affidavit—Notation—Equity.*—A contract to convey lands where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by sec. 25 of the statute. *Dillon v. Brocker*, 65.

2. *Same—Courts.*—The statute called the Torrens Law, under section 28 thereof, is the only "operative act" to "affect the title to lands registered thereunder," and, construing this with the other relevant sections, a contract to convey the lands so registered is a voluntary act affecting the title thereof, and under the statutory provisions such conveyance will not be recognized until recorded accordingly; and in the absence of compliance with the statute in this respect, the courts will not decree specific performance. *Ibid.*

3. *Torrens Law—Statutes—Registration—Contracts—Original Parties—Creditors and Purchasers.*—The statute known as the Torrens Law

TORRENS LAW—*Continued.*

draws no distinction between the original parties to deeds or contracts affecting title to lands registered under its provisions and creditors or purchasers, and in respect to such registration they stand upon the same footing. *Ibid.*

4. *Torrens Law—Statutes—Remedial—Interpretation.*—The Torrens Law is remedial and not in derogation of common right, and should be liberally construed, according to its intent, to advance the remedy and redress the mischief. *Ibid.*

5. *Torrens Law—Deeds and Conveyances—Parties—Estoppel—Statutes.*—Where a commissioner has sold land in conformity with the Torrens system, his deed cuts off the rights of all persons in being, or hereafter to come into being. Rev., 1590. *Hayden v. Hayden*, 260.

TORTS. See Courts, 1, 2; Carriers of Passengers, 1; Railroads, 6.

TOWNSHIPS. See Constitutional Law, 8, 13.

Townships—Powers—Statutes.—Townships have no corporate powers, municipal or otherwise, except those expressly conferred by legislative enactment, and only to the extent thereby conferred. Rev., sec. 1318, subsec. 3. *Road Commission v. Comrs.*, 62.

TRANSACTIONS AND COMMUNICATIONS. See Evidence, 13, 15.

TRANSCRIPT. See Appeal and Error, 37.

TRANSFER OF CAUSE. See Removal of Causes.

TRESPASS. See Damages, 1; Issues, 2.

1. *Trespass—Excessive Force—Livestock—Evidence—Damages.*—Where the defendant claims that the plaintiff has trespassed upon his lands in tying a cow thereon, and there is evidence that the defendant took the cow from the plaintiff with the use of excessive force, when the cow was not damaging him, it is competent for the plaintiff to show that she had obtained permission of the lessee of the land to tie her cow there, so as to show her good faith in so doing, and an instruction that the defendant was liable in damages if he had used excessive force is a proper one. *Kirkpatrick v. Crutchfield*, 348.

2. *Same—Impounding—Resistance.*—Revisal, sec. 1679, does not authorize the taking up and impounding of livestock unless running at large, and does not apply to cows securely tied to trees under the immediate control of the owner with the permission of the lessee of the land, and it is forcible trespass to take them away at the protest of the owner, to prevent which the owner may use all necessary force, unless the taking is by appropriate legal proceedings. *Ibid.*

3. *Trespass—Excessive Force—Personal Injury—Damages—Earning Capacity.*—Where a personal and permanent injury results from a forcible trespass, incapacity to earn money may be considered as an element of damages. *Ibid.*

TRIALS. See Vendor and Purchaser, 6; Options, 1; Homicide, 1, 18, 19; Employer and Employee, 4, 5, 6, 7, 8, 10; Evidence, 6, 20, 27, 29, 31; Husband and Wife, 5; Insurance, Life, 1; Judgments, 6, 9, 15; Bounda-

TRIALS—*Continued.*

ries, 2; Contracts, 7, 9, 10, 14, 16, 24; Bigamy, 2; Negligence, 1, 2, 3; Municipal Corporations, 4, 9; Criminal Law, 1, 14, 18; Issues, 1; Indictment, 1; Slander, 1; Railroads, 5; Evidence, 25; Instructions, 12.

1. *Trials—Remarks of Court—Improper Remarks—Appeal and Error—Instructions—Error Cured—Harmless Error—Courts—Attorney and Client.*—Where a witness is being cross-examined to show a contradiction between his testimony and an allegation in his sworn complaint, a remark by the court to the examining attorney, in the presence of the jury, "you are just quibbling over that," will not alone be construed as such reflection on counsel as to prejudice his standing or his case before the jury; and were it otherwise, the error would be cured by the judge referring specifically to it in his charge, and instructing the jury it was not so intended by him, and for them not to consider it. The duty of the courts and attorneys not to uselessly consume time in the trial of causes, pointed out and discussed by CLARK, C. J. *Stephenson v. Raleigh*, 168.

2. *Trials—Instructions—Contentions—Statement by Solicitor—Exceptions—Appeal and Error.*—Exception taken after verdict to the restatement by the solicitor, in a criminal case, of his contentions, allowed by the court while the court was recapitulating the contentions on both sides, is too late; for if the solicitor had misstated them, the attention of the judge should have been called to it at the time. *S. v. Baldwin*, 693.

TRUSTEE. See State's Lands, 1.

TRUSTS. See Deeds and Conveyances, 1, 18; Wills, 10, 11, 17, 24; Evidence, 3; Parties, 3; Pleadings, 2; State Lands, 1; Limitation of Actions, 5, 8; Executors and Administrators, 2.

1. *Trusts—Evidence—Deceased Persons—Parol Trusts—Resulting Trusts.* Testimony of a witness, disinterested in the result of the suit, that defendant' ancestor, under whom the plaintiff claims the land in controversy, told the witness, while the deceased and the plaintiff were together, that the land had been bought by himself and plaintiff, that each owned one-half, etc., is sufficient for the jury to find a resulting trust in plaintiff's favor under a deed taking title to the deceased alone, and not objectionable as a transaction or communication with a deceased person, forbidden by the statute. *Harris v. Harris*, 7.

2. *Trusts—Parol Trusts—Deceased Persons—Evidence—Objections and Exceptions—Appeal and Error.*—In a suit to establish a resulting trust in lands under a deed conveying title to the deceased, under whom defendant claims, an exception to the plaintiff's testimony on the ground of being objectionable as a transaction or communication with a deceased person must show, on appeal, when objection was made, such a transaction or communication as is prohibited by the statute, and his testimony, "We bought the land," etc., does not constitute reversible error when a part only of the testimony, the other part of which is competent and not separated, and made the sole ground of the exception. *Ibid.*

3. *Trusts—Parol Trusts—Resulting Trusts—Evidence—Presumptions—Instructions.*—Where there is evidence that the defendant's deceased

TRUSTS—*Continued.*

ancestor, under whom he claims lands, the subject of a suit to establish a resulting trust by parol, acquired the title with one-half of the purchase money paid to him by the plaintiff, the presumption is, nothing else appearing, that he acquired the title for himself and the plaintiff in equal interest, and where the form of the issue calls for a finding as to the intention of the parties in that respect, a charge of the court that the jury must find from the evidence, clear, cogent, and convincing, that the plaintiff not only furnished one-half of the purchase money, but that the deceased acquired the title to be held, as to one-half, in trust for plaintiff, is not objectionable as excluding from the consideration of the jury, when the charge is read as a whole, the intention to create a trust. *Summers v. Moore,* 113 N. C., 394, cited and applied. *Ibid.*

4. *Trusts—Interest—Necessaries—Verdict.*—Where a sum of money is held in trust for the minor daughter of the trustor until she shall become twenty-one years of age, allowing the sum of one hundred dollars to be expended for her education, and it is established by the verdict of the jury that this and an additional amount was expended by the trustees for her necessary expenses during her minority, including those of her marriage, and that under the terms of the trust the trustee had kept the money separate from his own, and that he was not chargeable with interest thereunder: *Held,* the amount expended for necessaries was properly deducted from the trust fund in making the settlement with the *cestui que trust,* and no interest was chargeable to the trustee therein. *Walker v. Woodhouse,* 57.

5. *Trusts—Parol Trusts—Statute of Frauds—Equity.*—The plaintiff and his two brothers were owners of an undivided half interest, as tenants in common, of lands descended to them as heirs at law of their deceased father, the defendant and her two sisters owning the other one-half interest as his heirs. The plaintiff and his two brothers mortgaged their one-half interest for the support of their sisters, the mortgage was foreclosed and the purchaser commenced proceedings for partition. There was evidence tending to show that during the pendency of the proceedings for partition it was agreed by parol between the purchaser and the parties to the present action that the plaintiff should acquire the half interest that he and his two brothers had mortgaged upon his paying to the purchaser the principal and interest, etc., of the purchase price, the title should be made to the defendant to be held by her in trust for the plaintiff, and that this was accordingly done: *Held,* the transaction did not fall within the intent and meaning of the statute of frauds, and the defendant, having acquired the title by reason of her promise, was required in equity to perform it; and that the jury having, under proper instructions, found the facts to be according to the evidence, the parol trust in plaintiff's favor was a valid and enforceable one. *McFarland v. Harrington,* 189.

6. *Trusts—Parol Trusts—Burden of Proof.*—The burden is on the plaintiff, in an action to engraft a parol trust upon the legal title to lands, to establish his contention by clear, strong, and convincing proof. *Ibid.*

7. *Trusts — Mortgages — Sales— Foreclosure— Purchasers— Mortgagors— Deeds and Conveyances—Issues—Judgments—Evidence.*—The widow

TRUSTS—*Continued.*

and administrator of the deceased husband, who had joined in his deed in trust on lands to secure bonds or notes given to third persons, may bid in the lands at the trustee's forclosure sale at its full value and obtain title, and upon the suit of a second mortgagee, or his personal representative to set aside the foreclosure sale and to declare the widow's deed void as to creditors, the question as to whether the sale was made by the holders of the bonds or the widow is immaterial, and will not affect the judgment rendered in her favor, nor will the refusal of issues tendered, but not supported by the evidence, be held for error. *Winchester v. Winchester*, 483.

UNDUE INFLUENCE. See Deeds and Conveyances, 13, 15; Pleadings, 4, 5.

USES. See Wills, 10.

USURY.

Usury—Forfeiture—Interest—Statutes.—Where an usurious rate of interest on money has been paid by the borrower of money, the statutory penalty is double the amount of the usury, but where it is only charged, and not collected, the statute eliminates the usury and forfeits the interest on the amount of the loan. Rev., sec. 1951. *Ragan v. Stephens*, 101.

VALUATION. See Evidence, 12.

VALUES. See Lotteries, 3.

VALUE OF GOODS. See Carriers of Goods.

VENDOR AND PURCHASER. See Mortgages, 1; Pleadings, 1; Contracts, 11, 13.

1. *Vendor and Purchaser—Sample—Carriers of Freight—Destroyed Shipment—Damages.*—Where a consignee refuses a shipment because it did not come up to the samples by which it had been sold, and there is evidence that the consignor instructed him to ship it back if it did not, and it was destroyed while being retransported: *Held*, the consignor may recover the value of the destroyed shipment if it was in accordance with the sample, apart from the agreement, and a request for special instruction, that if the jury believed the evidence the plaintiff waived his right to recover by consenting to its return, is properly refused. *Daniels v. Distributing Co.*, 15.

2. *Vendor and Purchaser—Contracts—Delivery—Intent.*—The physical delivery of specific goods contracted for is not required to pass the title to the purchaser, if the intent of the parties otherwise appears from the wording of the instrument. *Richardson v. Woodruff*, 46.

3. *Same—"Order, Notify"—Title—Attachment.*—Irish potatoes were bought to be placed in cold storage by the seller for future shipment from a distant point by common carrier, and were accordingly shipped "order, notify consignee": *Held*, the contract was executory until the goods were received and accepted by the consignee, giving him reasonable time for inspection before accepting it, to ascertain if they were of the kind or quality he had purchased; and to that time the title

VENDOR AND PURCHASER—*Continued.*

remained in the seller, and was subject to attachment by the purchaser for moneys he had advanced upon the purchase price. *Ibid.*

4. *Vendor and Purchaser—Liens—Exemptions—Homestead.*—A vendor's lien for the purchase money "does not attach" either to personalty or realty in this State, and the purchaser may claim his exemption or homestead therein by proper proceedings in apt time. *Befarrah v. Spell*, 231.

5. *Same—"Final Process"—Constitutional Law—Statutes.*—A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution, giving the creditor such right until execution or other final process. It is otherwise as to the demand for a homestead which must be allotted before levying upon the land. Con., Art. X, sec. 1; Rev., sec. 695. *Ibid.*

6. *Vendor and Purchaser—Merchandise—Sales in Bulk—Statutes—Fraud—Evidence—Prima Facie—Questions for Jury—Trials.*—Our statute, known as the "bulk sales law," declares void a sale of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, without first complying with certain requirements therein specified as to notice, etc., and when these statutory requirements have not been met, such sales are void, and when complied with, the sale is still *prima facie* evidence of fraud against the seller's creditors, and the issue as to the fraud must be submitted to the jury, and the sale will be declared void if the verdict establishes that there was such fraud. *Armfield Co. v. Saleeby*, 298.

7. *Same—Instructions—Special Requests—Appeal and Error.*—The sale of a large part of a stock of merchandise in bulk, within the contemplation of the "Bulk Sales Law," must be of a considerable part of the same, and 10 per cent is held insufficient to bring the sale within the intent and meaning of the statute. Where there is evidence to this effect, it is reversible error, if the court refuses a special instruction, that if they so found the facts to be, the answer to the issue should be in the defendant's favor, or fails to substantially embody the request in his charge. *Ibid.*

8. *Vendor and Purchaser—Merchandise—Sales in Bulk—Indebitatus Assumpsit.*—Where the defendant has sold his stock of merchandise, or a large part thereof, in bulk and in violation of the statute and without complying with the same as to notice, etc., a money recovery may be had of both the fraudulent seller and his purchaser for the value of the property wrongfully converted, upon the equitable principle of *indebitatus assumpsit*, if the property has been sold or cannot be reached by execution or ordinary process, the value of the property of which the seller's creditors have been deprived being an asset of the debtor, which should be fully applied in payment of the claim of creditors. *Ibid.*

9. *Vendor and Purchaser—Contracts—Extension of Time—Burden of Proof.*—The burden of proof is upon the buyer to show that the seller

VENDOR AND PURCHASER—*Continued.*

granted on demand to pay carrying charges, the seller could terminate the contract of purchase, in his action against the seller to recover damages for the defendant's breach thereof. *Sterne v. Milling Co.*, 479.

10. *Same—Evidence—Cancellation of Contract.*—Three carloads of flour were sold upon condition that they were to be ordered out by the purchaser within 30 days, unless a different date should be thereafter agreed upon, with carrying charges of 5 cents a barrel, if not ordered out on contract time, payable at the beginning of each period, and if goods were not ordered out, or on failure of purchaser on demand to pay carrying charges, the seller could terminate the contract and resell the goods for purchaser's account. After several months the seller wrote the purchaser asking for shipping instructions, suggesting future dates for shipment, and finally wired that unless shipping dates were wired within a specified time, with settlement of carrying charges, he would consider the order canceled. The buyer gave no reply to any of these letters: *Held*, no evidence of an extension of time granted by the letters under the terms of the contract, and the failure to answer the telegram was an implied consent to the cancellation of the contract. *Ibid.*

VENUE. See Executors and Administrators, 1; Statutes, 3; Bigamy, 2.

Venue—Statutes—Jurisdiction.—The venue of a civil action is controlled by statute, and the procedure is not jurisdictional in the absence of statutory provision to that effect. *Latham v. Latham*, 12.

VERDICT. See Trusts, 4; Criminal Law, 16; Employer and Employee, 2; Telegraphs, 1; Carriers of Goods, 20; Damages, 6; Indictment, 1.

Verdict—Interpretation—Evidence—Instructions.—The verdict of the jury must be construed in the light of the evidence and of the charge. *Moore v. Trust Co.*, 118.

VERDICT DIRECTING. See Deeds and Conveyances, 23.

VERDICT SET ASIDE. See Appeal and Error, 10, 13.

VOTE OF PEOPLE. See Counties, 1; Statutes, 12.

WAIVER. See Legal Tender, 1; Carriers of Goods, 2, 14; Mortgages, 12, 13, 15; Courts, 1; Wills, 19; Indictment, 5.

1. *Waiver—Mortgages—Interest—Disputed Amounts—Tender.*—The mortgagor of lands gave several notes secured by the mortgage, maturing at different dates, and upon the maturity of one of them, a dispute as to the whole amount of the interest then due on all the notes arose, whereupon the mortgagor, the plaintiff in the action to enjoin the sale, under the power in the instrument, tendered the proper amount of such interest, which the defendant mortgagor refused, demanding the full payment of the principal and interest of the mortgage debt, not then due according to the terms of the mortgage: *Held*, the defendant's refusal to accept the correct amount of interest due, and his conduct relating to it, was a waiver of any formal tender; and it appearing that the plaintiff was at all times able, ready and willing

WAIVER—*Continued.*

to pay the correct amount of the interest, and had deposited a larger amount than due in the clerk's office, an injunction against the sale was properly continued to the hearing. *Rogers v. Piland*, 70.

2. *Waiver—Tender—Validity—Grounds for Refusal.*—Where a creditor refuses a tender of payment as insufficient upon a specified ground he is confined thereto in a suit for an injunction against him wherein the question of the validity of the tender is involved, the debtor being ready, able and willing to pay the proper amount then due. *Ibid.*

WAR MEASURES. See Corporations, 1.

WARRANT. See Indictment, 5.

WARRANTY. See Drainage Districts, 1; Deeds and Conveyances, 22.

WATER SUPPLY. See Contracts, 23, 24.

WATERS. See Municipal Corporations, 5. 7.

WHARFAGE. See Entry, 1.

WIDOW. See Deeds and Conveyances, 11.

WILLS. See Limitation of Actions, 1; Deeds and Conveyances, 18, 24, 25; Estates, 1, 2.

1. *Wills—Codicils—Probate—Letters.*—By duly executed will testatrix devised her house to her two sons and on the following day wrote her attorney, the draftsman, she did not remember his reading this item to her; that she wanted her sons to have the house divided to suit them, etc. Upon admitting these several papers to probate in his order the clerk stated the paper-writing purporting to be the will was exhibited and duly proven by the subscribing witnesses, naming the attesting witnesses to the will and those by whom the letters were separately proven as a holograph will: *Held*, a sufficient recognition of the letters as codicils and a probate thereof, and the words of the certificate, "duly proven," carried the legal presumption that everything was properly done. *In re Will of Parham*, 106.

2. *Wills—Interpretation—Intent—Estates—Contingent Limitations—Title.* A will should be interpreted to effectuate the intention of the parties, and a devise of land to the two daughters until they should become of age "when it becomes theirs," vests the absolute fee-simple title in them upon their becoming of age; and a further provision, should they die, "leaving sister or sisters or brother or brothers of their mother's children, the sister or sisters or brother or brothers shall inherit the property," is construed to indicate the intention of the testator that the brothers or sisters would take upon the happening of the contingency of the death of the daughters before reaching the age specified. *McDonald v. Howe*, 257.

3. *Wills — Estates — Contingent Limitations— Interpretation— Vesting of Title.*—A devise will take effect at the earliest moment that its language will permit, which in this case is the arrival at the age of twenty-one of the testator's daughter. Rev., sec. 1581, as to limitations contingent upon any person dying without heirs, has no application. *Ibid.*

WILLS—*Continued.*

4. *Wills—Interpretation—Conflicting Clauses.*—A will should be construed as a whole to effectuate the intent of the testator and to reconcile apparently conflicting provisions. *Radford v. Rose,* 288.

5. *Same—Estates for Life—Contingent Limitations—Children—Defeasible Fee—Grandchildren—Deferred Possession.*—A devise for life to testator's named children and to their "heirs," in the sense of children, if they have any to attain the age of twenty-one, would, alone and disconnected from other parts of the will showing a contrary intent, deprive the grandchildren of all interest under the will unless they should attain the designated age; but with further provision, should the testator's children have no "bodily heirs" the estate should go to the testator's "family," and "should they have an heir at my death not under twenty-one years of age, the said heir shall be in possession" at that age: *Held,* the law favoring an early vesting of estates, and noting among other things the expression used, "have no bodily heirs," instead of "dying without bodily heirs," will construe the testator's intent that his children take a fee simple estate defeasible upon their dying without having had children, but postponing the possession of minor children born to them until they should reach the age designated. *Ibid.*

6. *Wills—Devise—"Loan."*—A "loan" of land to the testator's children for life, with contingent limitation over, is construed as "give or devise." *Ibid.*

7. *Wills—Estates for Life—Heirs—Rule in Shelley's Case.*—Construed alone, a devise to the testator's child for life and then to her heirs conveys a fee under the rule in *Shelley's case.* *Ibid.*

8. *Same—Limitations—Contingency—Same Line of Descent.*—A devise to the testator's daughter for life and to the testator's family, should the daughter have no children, does not carry the estate to a different line of descent upon the happening of the contingency, and *Puckett v. Morgan,* 158 N. C., 344, and *Jones v. Whichard,* 163 N. C., 244, cited and distinguished. *Ibid.*

9. *Wills — Interpretation — Intent — Precatory Words.*—Words in a will which, standing alone, may be construed as precatory and not binding, contrary to the will or desire of the person designated, will be construed as imperative upon him when by a proper interpretation of the entire instrument the testator's intent appears that they should be so. *Laws v. Christmas,* 359.

10. *Same—Testacy—Presumptions—Trusts—Uses.*—A testatrix used in her will the word "give" in the disposition of certain personalty, and the same word in regard to a house and lot to her sister, also to her "all the money I have in bank at my death; I want her well provided for a good sum and board." Also, after the death of the sister, "I want my house and lot to be sold, the money put in bank to go to her husband for the education of his children": *Held,* the intent of the testator in the use of the word "want" was that it should be imperative, which would avoid the presumption against intestacy, the husband to use the proceeds of the sale of the house and lot, in the bank, as trustee, for the declared purpose of the testatrix, that it should be used for the education of his children. *Ibid.*

WILLS—*Continued.*

11. *Wills—Trusts—Funds—Payment to Clerk—Receivers—Parent and Child.*—Where the testatrix has devised to the husband of her sister the proceeds of sale of a certain house and lot to be placed in bank for the education of his children, and it appears from his own allegation that he cannot give bond for the protection of the *cestuis que trustent*, whom he has not seen for a period of years and against whose interest he has claimed, it is proper for the court to see that the funds are secured for the purposes intended, in this case by payment thereof into the hands of the clerk of the Superior Court as receiver. *Ibid.*

12. *Wills—Powers—Sales—Deeds and Conveyances—Estoppel.*—A devise of an estate with contingent limitations over, giving the first taker the power to dispose of the lands by will: *Held*, her deed would estop those thereafter claiming title under her. *Smith v. Moore*, 370.

13. *Wills—Interpretation—Reconcilable Provisions—Estates—Limitations—Remainders—Contingencies.*—A devise of an estate to be equally divided between the testator's two daughters is not irreconcilable with the interpretation of the will as a whole that one of them takes a life estate, remainder to her children, and the other an estate with contingent limitations over; and, where this appears, the doctrine that the last clause of the will takes precedence over those before it in the instrument, where the language is ambiguous, does not apply, but the intention is to be ascertained by a fair and reasonable consideration of the entire instrument. *Ibid.*

14. *Wills—Devises—Purchasers—Rule in Shelley's Case—Indefinite Succession.*—Under a devise to the daughter of the testator for life, remainder to her children, and to another daughter with contingent remainder to the children of her sister, the intent of the testator will be construed that the grandchildren shall take under the will as purchasers, and not that the mother should take a fee-simple absolute, so that the children would take from her, at her death, in the quality or character of heirs, or heirs of her body, as a class, indefinitely, in succession; and the rule in *Shelley's case* will not apply. *Ibid.*

15. *Wills—Devises—Contingent Limitations—Sales—Reinvestment—Statutes.*—Lands devised for life with contingent limitations over may be sold for reinvestment under the provisions of Revisal, 1590, and effected under the court's order, subject to its future approval of the sale, when it is made to appear that the best interest of all parties so require, those living and in present interest are represented in person, and unborn children by guardian *ad litem*. *McLean v. Caldwell*, 424.

16. *Same—Purchaser—Application of Funds.*—A purchaser of devised lands affected with a life estate and contingent limitation over, sold for reinvestment under the provisions of Revisal, 1590, is not ordinarily charged with the duty of looking after the proper disposition of the purchase money, and upon paying it into court, under its order, he is quit of further obligation concerning it. *Ibid.*

WILLS—*Continued.*

17. *Wills—Devise—Executors and Administrators—Trusts—Powers—Consent of Widow—Deeds and Conveyances.*—By the related provisions of a will the testator gave his estate to his wife for life, appointed an executor, giving him general management thereof, imposed upon him the duty to consult with the widow and secure her written consent "regarding all matters of sale and investment," and that within the discretion of the executor, any property that the testator may own at the time of his death, "be sold, and the proceeds of same reinvested in good and substantial stocks, bonds, or real estate": *Held*, the discretion of the executor was restricted by the terms of the will only by the requirement for the consent of the widow in writing, and a sale of the testator's lands accordingly made, conveyed a good title. *Shannonhouse v. Fleetwood*, 447.

18. *Wills—Caveat—Purchasers from Heirs.*—The purchasers of land from the heirs of the deceased owner "are interested in the estate" within the intent and meaning of Rev., 3135, and thereunder, and under the rule of justice, reason, and authority, are entitled to caveat a will brought forward many years thereafter, and admitted to probate in common form. *In re Thompson*, 540.

19. *Wills—Devise—Residence at Home Place—Waiver—Estates—Determinable Estates—Alternative Rights.*—A testator, among other things, devised the place upon which he had resided to his children as long as they remain single as a "common home for them all, but if any of them shall marry, then they, the married ones, shall look out for some other place"; and, later in the will, "that the home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then to be divided between the next of kin." The single members of the family signified that they did not choose to reside at the home place by a petition to the court to that effect, and asked that the property be divided according to the terms of the will: *Held*, the words "if they choose to do so" referred to the residence of the single children at the "home place," which they could waive or abandon by asking the court to divide the same according to the provision of the will, all the children, in that event, being tenants in common, with the right of partition. *Semble*, such children, if holding a determinable life estate, could choose this course as an alternative right under the will. *Sides v. Sides*, 554.

20. *Wills—Probate—Registration—Statutes—Amendments—Heirs at Law—Purchasers.*—Under Rev., 3139, prior to the amendment of chapter 219, Laws 1915, which became effective 9 March, 1915, there was no limitation as to the time when a will could be probated and recorded, the ordinary registration acts having no application to wills, and they becoming effective from the death of the testator, until the enactment of the later law, ordinarily passing the title to devises from that date against all dispositions or conveyances from the heirs to the contrary. *Barnhardt v. Morrison*, 563.

21. *Wills—Probate—Registration—Statutes—Prospective Effect—Heirs—Purchasers.*—The owner of lands died intestate, her husband taking a life estate as tenant by the courtesy, leaving three children surviving. One of these died without issue surviving, or issue of such, and

WILLS—*Continued.*

the other two acquired the life estate of their father and sold the same under proceeding to partition among themselves as tenants in common, unaware that their deceased sister had made a will devising her interest to her husband, who, under the provisions of Rev., 3139, did not have the will probated until after the sale for partition, of which he was not previously aware: *Held*, the statute gave him the legal right to have the will, under the circumstances, probated and recorded, and relate back as of the time of the death of the testatrix, his wife; and there being no evidence that he had misled any one by his declarations, acts, or conduct, there is nothing upon which the equitable principles of estoppel *in pais* would operate to deny his rights against the purchaser at the partition sale. *Ibid.*

22. *Wills—Statutes—Probate—Heirs at Law—Purchasers—Devisees—Death of Testator—Prospective Effect.*—A statute will not be construed to have a retroactive effect to destroy an existing right given under a former statute unless the language thereof is clear and unmistakable; and construing chapter 219, Laws 1915, amendatory of Rev., 3139, under which unlimited time is given to probate and register a will, etc., that such probate and registration "shall not offset the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator," etc., it is *Held*, that the amendment is prospective in effect. *Ibid.*

23. *Same—Limitation of Actions—Inadequate Time—Legislative Powers—Actions—Constitutional Law.*—Chapter 219, Laws 1915, amendatory of Rev., 3139, fixes the time as two years within which a will must be probated and recorded to affect the rights of purchasers from the heirs at law, and this limitation being exclusively within the authority of the Legislature to make, except where the time is manifestly inadequate, etc., it is held that the Laws of 1915, in order to give a devisee time to probate the will, allows two years in which to probate from the time of its enforcement. *Ibid.*

24. *Wills—Devise—Estate—Trusts—Survivor—Deeds and Conveyances—Estoppel.*—A devise of lands to the executor in trust for the testator's three children, to be used by them for a home until one of them survived, and then to be conveyed by the executor to him in fee: *Held*, whether the children took a contingent or vested remainder, the deed of the three *cestuis que trustent*, joined in by the trustee, conveyed a fee simple absolute title to the purchaser, the deed estopping the heirs of the survivor. *Loftin v. English*, 606.

WITNESSES. See Statutes, 1; Evidence, 33; Criminal Law, 5.

Witnesses—Evidence—Children—Findings—Appeal and Error.—The finding of the trial judge as to the competency of a witness to testify on account of his childhood is conclusive on appeal. *S. v. Phillips*, 713.

WRITINGS. See Contracts, 1; Evidence, 23, 24.

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